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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

GREENE COUNTY PLANNING BOARD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–29a) is reported at 455 F. 2d 412. The order of the Federal Power Commission (App. E, *infra*, pp. 50a–63a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 30a) was entered on January 17, 1972. The petition of the Commission for rehearing and sug-

gestion for *en banc* consideration thereof was denied on March 10, 1972 (App. C, *infra*, pp. 31a–32a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether Section 102 of the National Environmental Policy Act, 42 U.S.C. 4332, requires the staff of the Federal Power Commission to prepare a detailed draft environmental statement in a contested licensing proceeding under the Federal Power Act, 16 U.S.C. 791a, prior to the holding of hearings by a hearing examiner under the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*, on the license application, when one of the purposes of the hearings is to obtain evidence on the environmental impact of the proposed project for which the license is sought.

STATUTE INVOLVED

Section 102 of the National Environmental Policy Act, 42 U.S.C. 4332, provides in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * * * *

STATEMENT

This case involves the requirements contained in Section 102(2)(C) of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4332(2)(C), that federal agencies prepare detailed environmental impact statements with respect to proposals for major federal actions and that such statements

accompany the proposals "through the existing agency review processes." The court below construed Section 102(2)(C) to require the staff of the Federal Power Commission to prepare a detailed environmental impact statement in a licensing proceeding for use at hearings to be held on the license application (App. A. *infra*, p. 18a), even though one of the purposes of the hearings is to obtain evidence on the environmental impact of the proposed project for which the license is sought.

The controversy had its genesis in an application filed in August 1968, pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), by the Power Authority of the State of New York ("PASNY") to construct, operate and maintain a pump storage project along Schoharie Creek near the towns of Blenheim and Gilboa, New York. In addition to this principal project work, the application requested approval for three 345 kilovolt transmission lines running to Delhi, New Scotland, and Catskill, New York, respectively.

Although notice of the application was published in the surrounding area, no interventions were filed and in June 1969 the Commission granted a license to PASNY to construct, operate and maintain the Blenheim-Gilboa project (41 FPC 712). While the Commission also licensed the three 345 kv transmission lines, Article 34 of the license specifically prohibited construction of the lines until further Commission approval was given to "plans for preservation and enhancement of the environment as it may be affected by the transmission lines['] design, and location" (41

FPC at 718). In formulating these plans, PASNY was instructed to "give appropriate consideration to recognized guidelines for protecting the environment and to beneficial uses, including wildlife, of the transmission lines['] rights of way" (41 FPC at 718).

Pursuant to Article 34, PASNY applied for authorization to construct the three proposed transmission lines in November 1969. Following notice of the proposed construction, several protests and interventions were filed, including that of respondent, the Greene County Planning Board, in connection with one of the three lines—the line from Gilboa to the Leeds substation near Catskill, New York. After the Commission's staff examined the possible environmental impact of the two uncontested lines, the Commission approved their construction, but reserved consideration of the Gilboa-Leeds line (43 FPC 521).

In December 1970, PASNY filed two alternative proposals for routing the Gilboa-Leeds line, and in March 1971, pursuant to Section 2.81 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 2.81,[1] submitted to the Commission and served on all parties a detailed environmental statement, showing three possible variations of the alternate routes. Following review by the Commission's staff for form, the statement was circulated for comment to various fed-

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[1] 18 C.F.R. 2.80, 2.81 and 2.82—the rules promulgated by the Commission to implement the policies expressed in NEPA—were revised in November 1971. 36 Fed. Reg. 22738-22741. The Commission's order amending the rules is set forth as Appendix D, *infra*, pp. 33a–49a). The procedures embodied in the rules are discussed at pp. 10–11, *infra*.

eral and state agencies and made available to the public.

Subsequently, the Commission ordered a hearing on PASNY's proposals (R. 530–532).[2] At a prehearing conference, Greene County requested the hearing examiner to set a date for the filing of the Commission's environmental impact statement. Finding that the requested action would cause an indefinite delay and that the matter could be effectively handled by the Commission at the conclusion of the hearing and upon the issuance of an initial decision, the examiner denied the motion (R. 628, 630, 632). Greene County appealed to the Commission from the examiner's order, claiming that the refusal to require the staff to prepare a draft environmental statement prior to the hearing violated Section 102 of NEPA. Because the Commission did not act on the appeal within thirty days, the appeal was denied by operation of law (see 18 C.F.R. 1.28 (c)).

The Commission granted Greene County's subsequent application for rehearing, but refused to require the staff to file a detailed environmental statement (App. E, *infra*, pp. 59a–61a, 63a). The Commission noted that its staff is not required by the Commission's rules to prepare a draft environmental statement in advance of hearings (App. E, *infra*, p. 54a). The Commission stated, however, that the staff is required to make every effort to assure that the records of the licensing proceedings are complete and is required, upon completion of the hearings, to propose an environmental statement to

[2] "R." refers to the record before the Commission as certified to the court of appeals.

assist the examiner and the Commission in meeting their responsibilities under both the Federal Power Act and NEPA and to enable the Commission to include a detailed environmental statement in its final order in the proceeding, after all interested parties have been heard (App. E, *infra*, pp. 54a–55a). See 18 C.F.R. 2.81(e) (App. D, *infra*, p. 45a)

On petitions for review, the court of appeals focused on the requirements contained in Section 102(2)(C) of NEPA that federal agencies prepare environmental impact statements on proposals for major federal action, that the agencies consult with other federal agencies prior to preparing the statements and that the statements accompany the proposals "through the existing agency review processes." The court concluded that the consulting requirement had been met in this case by the circulation of PASNY's proposals to other federal agencies (App. A, *infra*, pp. 17a–18a), but held that the Commission had failed to prepare an environmental impact statement in time for it to accompany PASNY's proposals "through the existing agency review processes," which, in its view, included the hearings (App. A, *infra*, pp. 16a–17a). Accordingly, the court ordered the staff to prepare a detailed environmental impact statement prior to the closing of the hearing. In addition, the court held that the intervenors must be given an opportunity to cross-examine both PASNY's and the Commission's witnesses in light of the statement (App. A, *infra*, p. 18a).[2]

[2] While the Commission's petition for rehearing was pending before the court of appeals, the Commission ordered all participants in the proceeding to submit certain environmental information and ordered the staff to prepare an impact statement on the basis of such information for use at a subsequent hear-

REASONS FOR GRANTING THE WRIT

The issue presented by this case is of fundamental importance not only to the Federal Power Commission's administration of both the Federal Power Act, 16 U.S.C. 791a *et seq.*, and the Natural Gas Act, 15 U.S.C. 717 *et seq.*, but also to the effective discharge by other federal licensing agencies of their statutory obligations.[4] The decision below, in construing Section 102(2)(C) of NEPA to require the Commission's staff to prepare a draft environmental impact statement prior to hearings on the environmental impact of PASNY's proposals, fails to take properly into account the nature of adversary licensing proceedings and would, in its reasoning, unjustifiably impose inflexible procedures in this area on all federal agencies. If not overturned, the court's interpretation of NEPA will severely restrict the ability of the Com-

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ing, Project No. 2685, Order Adopting Procedure for Hearing (March 7, 1972). Following denial of the petition for rehearing and the Solicitor General's determination that this petition would be filed, the Commission entered a subsequent order rescinding in part its earlier order and staying the proceedings pending final review by this Court. Project No. 2685, Order Partially Rescinding Order of March 7, 1972 and Staying Further Proceedings (June 1, 1972). This latter order was deemed necessary to preserve the status quo and prevent the case from becoming moot before review by this Court.

[4] The Interstate Commerce Commission and the Civil Aeronautics Board, both licensing agencies, have expressed particular concern to us over the possible impact of the decision below on their operations. Other federal agencies who have indicated support for our position in this case are: the Atomic Energy Commission, the Federal Trade Commission, the Federal Maritime Commission, the Department of Transportation and the Law Enforcement Assistance Administration within the Department of Justice.

mission and other federal agencies which conduct licensing hearings to develop procedures tailored for the orderly discharge of their responsibilities.

1. Section 102 of NEPA provides that "to the fullest extent possible," federal agencies shall include in reports on proposals for major federal action an environmental impact statement by the "responsible official" and that the statement shall accompany the proposal through the "existing agency review processes." In our view, these provisions do not require preparation of a statement by the Commission's staff prior to the examiner's hearings in adversary licensing proceedings.

In the first place, the staff is not collectively the "responsible official" for determining whether a license should be granted in a given proceeding. Cf. *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1359 (C.A. 2), certiorari denied, 404 U.S. 827. The staff's function in licensing proceedings is to examine licensing applications and participate in hearings to assure that all relevant issues are fully explored.[2] Under long-established Commission practice, it is the hearing examiner who is responsible for ruling on the merits of an application in the first instance.[3] Yet, under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, the hearing examiner (and the

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[2] By requiring the staff to prepare an environmental impact statement prior to the hearing, the decision below may have the practical effect of forcing the staff to take a position on environmental issues prior to the submission of relevant evidence by participants in the hearing.

[3] Initial decision by the hearing examiner may, however, be waived. See 18 C.F.R. 1.30(c).

Commission as well) can proceed only on the basis of a record developed at a hearing. Thus, in licensing proceedings, there is no "responsible official" who can prepare an impact statement prior to the completion of hearings.

It is also doubtful whether the "agency review processes," referred to in Section 102(2)(C), include the hearings conducted in licensing proceedings. The hearings are fundamentally a vehicle for compiling relevant evidence on the merits of a given proposal; only when the hearings are completed, does the task—initially assigned to the examiner—of weighing the evidence and reaching a decision on the merits begin.

2. The procedures adopted by the Commission in response to the National Environmental Policy Act (App. D., *infra*, pp. 42a–49a)[7] comply with both the letter and the spirit of the Act and assure that environmental issues will be promptly identified and fully considered in licensing proceedings. Under those procedures, an applicant for a license under the Federal Power Act must submit a draft environmental impact statement with his application specifically covering the factors set forth in Section 102(2)(C) of NEPA. 18 C.F.R. 2.80(b), 2.81(b), 4.41, Ex. W. Following an initial review by the staff, the statement is circulated to all appropriate federal and state agencies for comments and made available to the public. 18 C.F.R. 2.81(b).

[7] As noted above (p. 5 n. 1, *supra*), the procedures were revised in November 1971 while this case was pending before the court below. Since the revised procedures would govern all further proceedings in this case, the decision below, in effect, struck down those procedures.

The applicant, staff and intervenors taking a position on environmental matters are directed to offer evidence at the hearing in support of their respective environmental positions and must, in their initial and reply briefs filed before the examiner, specifically analyze and evaluate the evidence in the light of the environmental criteria contained in Section 102(2)(C) of NEPA. 18 C.F.R. 2.81(d), (e). The initial decision of the examiner must contain a similar analysis, which may be controverted in briefs on exceptions and briefs opposing exceptions to that decision before the Commission. If the Commission, upon review of the examiner's decision, grants the application, its decision will include a final detailed environmental statement. 18 C.F.R. 2.81(e).

In short, the environmental issues are identified prior to the hearing by the applicant's draft environmental statement and by comments from interested agencies and intervenors. See 18 C.F.R. 2.81(e). The hearing then serves as a vehicle for developing the issues more fully. On the basis of the hearing record, the issues are fully analyzed by the participants for the benefit of the examiner, whose initial decision can properly be construed as the "detailed statement" by the "responsible official" required by Section 102(2)(C) of NEPA. With the full benefit of these comprehensive analyses, including further analyses in the briefs filed before the Commission supporting or opposing the examiner's decision, the Commission is in a position to weigh the environmental consequences of the proposed project in reaching a final decision on the merits of the application.

3. The decision below, in imposing a uniform procedure on all federal agencies for complying with NEPA, fails to recognize the critical distinctions between licensing and constructing agencies—*i.e.*, agencies which themselves initiate and promote federal projects. A constructing agency has all the elements of a proposal within its control from inception and the ability to direct its staff resources to the projects it considers most important; a licensing agency, on the other hand, lacks control of the information necessary to reach a decision and the resources necessary to assume the burden of production and proof of environmental consequences on all applications whose approval would constitute major federal action. Consequently, a licensing agency must depend on the evidentiary record developed by input from all interested parties, including its staff, as its primary source of data.

Moreover, constructing agencies can effectively limit the number of projects under consideration at a given time. No such option is available to a licensing agency. The Commission, for example, during fiscal year 1970 received, with respect to proposed or existing hydroelectric projects, 193 applications for preliminary permits, licenses or changes in existing licenses. Federal Power Commission 1970 Annual Report, p. 33. For the same period, requests for natural gas pipeline certifications, abandonments, and interconnections totaled 234. *Id.* at 63. Of course, not all applications involve "major Federal actions" requiring impact statements under Section 102(2)(C) of NEPA.

Under the decision below, the staff would be required to prepare complete environmental studies on each application prior to the holding of hearings. In view of the limited staff of the Commission, inordinate delays would result. Moreover, in light of the Commission's procedures discussed above, compliance with the decision below is unlikely to increase the scope of consideration already given by the Commission to environmental issues. In short, the court of appeals has imposed an inappropriate, inflexible procedure on the Commission mandated by neither logic nor the language of Section 102(2)(C) of the National Environmental Policy Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1972.

APPENDIX A

United States Court of Appeals for the Second Circuit

Nos. 434, 435—September Term, 1971

(Argued December 16, 1971; Decided January 17, 1972)

Dockets Nos. 71-1991, 71-1996

71-1991

GREENE COUNTY PLANNING BOARD, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, POWER AUTHORITY OF THE STATE OF NEW YORK, THE SIERRA CLUB, INTERVENORS

(Consolidated with 71-1996)

71-1996

TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

(Consolidated with 71-1991)

Before: SMITH, KAUFMAN, AND MULLIGAN, *Circuit Judges.*

367-518—72——2

KAUFMAN, *Circuit Judge:*

We are called upon to assess the licensing procedures of the Federal Power Commission in a proceeding upon the application [1] of the Power Authority of the State of New York (PASNY) for authorization to construct a high-voltage transmission line. Although the petitioners—Greene County Planning Board, the Town of Durham, New York, and the Association for the Preservation of Durham Valley—raise several interesting arguments, the dispute centers on compliance with the procedural mandates of Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. § 4332(2)(C), which requires all federal agencies to issue a "detailed statement" on the environmental impact of all "major Federal actions significantly affecting the quality of the human environment . . . ." This sec-

[1] Application was made to Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), which provides in pertinent part:

"The Commission is hereby authorized and empowered—

* * * * *

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam * * *."

tion is an essential "action forcing" provision[2] in legislation designed "[t]o declare a national policy which will encourage productive harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."[3] NEPA § 2, 42 U.S.C.A. § 4321. In addition, petitioners ask us to decide that the Commission has discretion in the public interest, to pay the attorneys' fees and other expenses of the intervenors in the proceedings. We find that the Commission has not complied with NEPA and remand for further proceedings, but under the circumstances presented to us, we refuse to order the Commission or PASNY to pay the expenses and counsel fees of the private intervenors.

A brief statement of the proceedings thus far will aid in comprehending the arguments advanced. On August 15, 1968, PASNY filed an application to construct, operate and maintain a 1,000,000 kilowatt pumped storage power project[4] along the middle

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[2] *See* S. Rep. No. 91-296, 91st Cong., 1st Sess. 20 (1969); *Environmental Quality, the Second Annual Report of the Council on Environmental Quality* ch. 5, (Aug. 1971), reprinted in 1 Environmental L. Rep. 50057, 50064 [hereinafter cited as *CEQ Report*].

[3] *See generally* Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 Rutgers L. Rev. 230 (1970); Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 Environmental L. Rep. 50035.

[4] A pumped storage power facility is designed to provide energy during the hours of peak kilowatt demand. The functioning of such a facility is explained in our decision in *Scenic*

reaches of Schoharie Creek in the towns of Blenheim and Gilboa, New York, some forty miles southwest of Albany. The project as proposed, *inter alia,* consisted of: (1) an upper reservoir; (2) a lower reservoir (including a dam across Schoharie Creek); (3) an outdoor power house and (4) three 345 kilovolt transmission lines—one from the switchyard adjacent to the powerhouse to a substation at New Scotland, one to a substation at Fraser and the last to a substation at Leeds.[5] After consulting with several federal agencies, the Commission granted the license. Power Authority of the State of New York, Project No. 2685, 41 F.P.C. (June 6, 1969). Article 34 of the license, however, specifically prohibited construction of the transmission lines until further Commission approval was given to "plans for preservation and enhancement of the environment as it may be affected by the transmission lines design and location."[6] *Id.* at 718. In preparing the plans, PASNY was required to "give appropriate consideration to recognized guidelines for protecting the environment and to beneficial uses, including wildlife, of the transmission lines right-of-way." *Ibid.*

PASNY applied for construction authorization of the three lines on November 24, 1969. When no pro-

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Hudson Preservation Conference v. *Federal Power Commission*, 354 F. 2d 608, 612 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. of New York* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966). *See also* Loving, *A Vast New Warehouse for Electricity*, Fortune 88 (Dec. 1971).

[5] Exhibit R to PASNY's application proposed a recreational use plan including overlook areas and a State Park.

[6] Other restrictions on the license included provisions for flood control, additional studies with respect to fish and wildlife resources, protection for the covered Blenheim Bridge and development of a plan to blend the project works with the natural view.

tests or petitions were filed with respect to the Gilboa-New Scotland and Gilboa-Fraser lines, the Commission approved construction of these two lines without holding a hearing. Power Authority of the State of New York, Project No. 2685, 43 F.P.C. 521 (April 10, 1970). Nevertheless, the Commission, after conducting a full inspection and conferring with PASNY's staff and consultants, "concluded that from an aesthetic and environmental values point of view, the selected locations of the two lines involved herein are preferable to all of the alternative routings that were considered." *Id.* at 522–23.

The Commission, however, received several protests with respect to the Gilboa-Leeds line which was to run from the project in Schoharie County, through the Durham Valley, past the town of Durham (in Greene County) to the Leeds Substation less than two miles from the Hudson River near Catskill. Motions to intervene were filed by the Greene County Planning Board, the Town of Durham, the Association for the Preservation of the Durham Valley,[4] the Sierra Club and several individuals.[5] Intervention was granted on May 19, 1970, but participation was limited to the issues raised in the petitions to intervene—namely, the impact of the line on the Durham Valley in particular and Greene County in general.

NEPA became effective on January 1, 1970, after PASNY applied for the transmission line permits, but before the permits were issued for the Gilboa-New

[4] The Association is a voluntary, unincorporated, nonprofit association organized in 1969 to protect and preserve the scenic, historical and ecological values of the Durham Valley area. In January, 1970, the Association had over 100 members who in the aggregate owned more than 5,000 acres of land in Durham Valley and its immediate vicinity.

[5] The individual intervenors own land in the Durham Valley.

Scotland and Gilboa-Fraser lines. It was not until almost a year later, on December 2, 1970, that the Commission issued Order No. 415 to implement procedures in accord with NEPA. 18 C.F.R. §§ 2.80–.82 (January 1, 1971). Section 2.81(b) of the regulations required each applicant for a license for a "major project" to file its own detailed statement of environmental impact, developing fully the five factors listed in section 102(2)(C) of NEPA.[9] Although the regulations required the Commission staff to prepare a detailed statement in the case of all uncontested applications, no such statement was required where applications were contested.[10] *See* 18 C.F.R. §§ 2.81(e)–(f) (January 1, 1971).

In accordance with Commission regulations, PASNY filed its impact statement on March 21, 1971, covering the proposed Gilboa-Leeds line and two alternative routings. The Commission reviewed the statement as to sufficiency of form, *see* 18 C.F.R. § 2.81 (b) (January 1, 1971), and then circulated it for

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[9] The five factors are:

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

"(iii) alternatives to the proposed action.

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

[10] Under Section 2.81(e)(1), the Commission staff was expected to "specifically analyze and evaluate the evidence in the light of the environmental criteria * * *."

The Commission revised its rules by Order No. 415-B, issued November 19, 1971, 36 Fed. Reg. 22738 (Nov. 30, 1971). Section 2.81 no longer requires the Commission to prepare its own statement in uncontested proceedings.

comment to agencies with "special expertise with respect to any environmental impact involved."[11] *See* NEPA § 102(2)(C) 42 U.S.C.A. § 4332(2)(C).

Finally, by order issued May 4, 1971, the Commission ordered a hearing on PASNY's proposals and set a prehearing conference for June 22, 1971. At this conference, Durham and Greene County moved that PASNY, or alternatively the Commission, pay the expenses and fees, including attorneys' fees, incurred by the intervenors in the proceeding. Greene County also requested the Presiding Examiner to set a date for the Commission to file its own impact statement pursuant to NEPA. Then, by motions filed July 6 and July 12, 1971, the intervenors moved for an order vacating, rescinding or suspending the June 6, 1969, license of the entire project and enjoining further construction, alleging that the Commission did not comply with the notice requirements of the Federal Power Act and the mandates of NEPA.[12]

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[11] The statement was circulated to the Hudson River Valley Commission, the Secretary of the Interior, the Secretary of Agriculture, the Army Corps of Engineers, the New York Department of Environmental Conservation and the Environmental Protection Agency.

[12] Intervenors made several motions, either orally or in writing, which are not recounted here, since they were merely variations of the theme we already have presented.

Intervenors, however, unsuccessfully moved that they be provided copies of the transcript without charge, that their non-expert witnesses be allowed to testify orally without first filing written testimony, and that the hearings be held in Greene County. The Commission denied appeals from the Presiding Examiner's decisions, noting that it is within his discretion to determine procedural matters relating to the hearings. Although petitioners preserved their objections to the Presiding Examiner's decisions by petitioning for review of the Commission's orders, they have not raised these issues on appeal. Nevertheless, we are constrained to note that the Commission at nearly every

The Presiding Examiner denied each of the motions, and the movants filed timely notices of appeal to the Commission. *See* 18 C.F.R. § 1.28 (January 1, 1971). Although each appeal was denied *sub silentio* by operation of law,[13] the Commission granted rehearings and by orders dated October 28 and 29, 1971, it formally denied the appeals. Petitioners ask us to review those orders. *See* Federal Power Act § 313, 16 U.S.C. § 825*l*.

Before passing to the merits of petitioners' contentions, we note that the latest round of hearings commenced on November 9, 1971. Petitioners moved for a stay of these hearings in this Court, but the motion was denied on November 1. To date, the hearings have been concerned with cross-examination of PASNY and Commission witnesses. They are expected to continue for several months. In addition, the

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turn had made it difficult procedurally for the intervenors. For example, intervenors were forced to go to court to compel disclosures under the Freedom of Information Act. *See Town of Durham* v. *Federal Power Commission*, 71 Civ. 3993 (S.D.N.Y. Oct. 26, 1971). We suggest that the Federal Power Commission, as well as other Federal Agencies, must review their rules and rethink encrusted, entrenched positions in light of the provision in NEPA that, "to the fullest extent possible," all regulations of the agencies must be interpreted and administered in accordance with the policies of the Act. NEPA § 102(1), 42 U.S.C.A. § 4332(1). We fully agree with the Council on Environmental Quality that compliance is required not only with the letter, but the spirit of the Act. Council on Environmental Quality, Guidelines § 1, 36 Fed Reg. 7724 (April 23, 1971).

[13] Section 1.28(c) of the Commission's rules provides in part:

"(c) *Commission action.* Unless the Commission acts upon questions referred by presiding officers to the Commission for determination or upon appeals taken to the Commission from rulings of presiding officers within thirty days after referral or filing of the appeal, whichever is later, such referrals or appeals shall be deemed to have been denied."

entire project, exclusive of the Gilboa-Leeds transmission line, is now more than 80% complete.[14]

4. COMPLIANCE WITH NEPA

A. Gilboa-Leeds Transmission Line

Section 102(2)(C) of NEPA, as we stated at the outset, requires every federal agency to "include in every recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment" a detailed environmental impact statement. Prior to making the statement, the agency must "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." The detailed statement, however, "*must accompany the proposal through the existing agency review processes.* * * *"[15] (Emphasis added.)

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[14] We are told that more than 75% of the estimated $160,000,000 total cost has been spent or committed.

[15] Section 102(2)(C) provides in full:

"SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall—

* * * * *

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action.

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

"(iii) alternatives to the proposed action.

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of re-

It is conceded that authorization of the Gilboa-Leeds line, an integral part of the Blenheim-Gilboa Project, would constitute a major federal action. The parties, however, are in vigorous disagreement over when the Commission must make its impact statement. The Commission argues that PASNY's statement, reviewed as to form by the Commission and circulated by it, suffices for the purposes of Section 102(2)(C) and that the Commission is not required to make its *own* statement until it files its final decision. Petitioners argue that the Commission must issue its statement prior to any formal hearings. PASNY, perhaps recognizing that the Commission's position is untenable, but nevertheless anxious to expedite the proceedings, proposes a third course of action. It urges that the Commission can draft its statement on the basis of the hearings, but to be circulated by it for comment before its final decision. It is clear to us that petitioners offer the correct interpretation.

Section 101(a) of NEPA, 42 U.S.C.A. § 4331(a), declares that "it is the continuing policy of the Federal Government * * * to use all practicable

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sources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;"

means and measures * * * in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." To this end the government must "coordinate Federal plans, functions, programs, and resources. * * *" NEPA § 101 (b), 42 U.S.C.A. § 4331(b). As long as six years ago, this Court remanded a case to the Commission because, in granting a license for the construction of a similar pumped storage power project at Storm King Mountain on the Hudson River it had failed to weigh the factors of "the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites." [16] *Scenic Hudson Preservation Conference* v. *Federal Power Commission* [*Scenic Hudson I*], 354 F. 2d 608, 614 (165), *cert. denied sub nom. Consolidated Edison Co. of New York* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966).

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[16] The decision was based upon Section 10(a) of the Federal Power Act, 16 U.S.C. § 803, which provides:

"All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

See also Udall v. *Federal Power Commission*, 387 U.S. 428 (1967).

We commented there: "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it: the right of the public must receive active and affirmative protection at the hands of the Commission." *Id.* at 620. But NEPA, which was a response to the urgent need for a similar approach in all federal agencies,[17] went far beyond the requirement that the agency merely consider environmental factors and include those factors in the record subject to review by the courts.

In addition to the environmental impact statement, Section 102(2) requires the agency, *inter alia*, to:

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> * * * * *
>
> (D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
>
> * * * * *
>
> (E) recognize the worldwide and long-range character of environmental problems * * *.

We view this section as did the District of Columbia Circuit. It is a mandate to consider environmental values "at every distinctive and comprehensive stage of the [agency's] process." The primary and nondelegable responsibility for fulfilling that function lies with the Commission. *Calvert Cliffs' Coordinat-*

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[17] *See* Hanks & Hanks, *supra* note 3, at 265–69.

ing Committee, Inc. v. Atomic Energy Commission, 449 F. 2d 1109, 1119 (D.C. Cir. 1971) (holding that rules of the AEC which did not require a detailed statement in an uncontested licensing proceeding did not comply with Section 102(2)(C)).

The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire.[18] The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions.[19] In fact, PASNY's statement begins: "Neither the construction nor the operation of the Gilboa-Leeds transmission line will have any significant adverse impact on the environment." But, the Gilboa-Leeds line, if constructed as proposed, will cut a swath approximately 35 miles long and 150 feet wide across the face of Greene and Schoharie Counties. It is small consolation that the line will not scar either existing historical sites or designated park land.

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[18] The Commission did not face squarely the issue of compliance with NEPA in its orders. In upholding the Presiding Examiner's refusal to delay the hearings until the Commission had prepared its statement, the Commission said:

"* * * they [Durham and Greene County] simply ask the Commission to reconsider that which the Presiding Examiner found to be not in the public interest. For the reasons given in connection with the preceding appeal [the Presiding Examiner has broad discretion over hearing procedures], reconsideration of such procedural matter will be denied * * *."

[19] *Cf. Scenic Hudson I*, 354 F. 2d at 619: "self-serving general statements by officials of Consolidated Edison * * *."

Moreover, although decisions like *Scenic Hudson I* have greatly expanded the concept of standing to challenge administrative action,[20] intervenors generally have limited resources, both in terms of money and technical expertise, and thus may not be able to provide an effective analysis of environmental factors.[21] It was in part for this reason that Congress has compelled agencies to seek the aid of all available expertise and formulate their own position early in the review process. The Commission argues, however, that written testimony of its staff demonstrates that the Commission has not left the applicant and the intervenors to develop the record. It insists that its staff has undertaken field research in an effort to investigate alternatives proposed by PASNY and also any additional feasible alternatives. It is clear to us that this testimony cannot replace a single coherent and comprehensive environmental analysis, which is itself subject to scrutiny during the agency review processes. If this course of action we approve were not followed, alternatives might be lost as the applicant's statement tended to produce a *status quo* syndrome.

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[20] *See, e.g., Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970); *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F. 2d 97 (2d Cir.), *cert denied*, 400 U.S. 949 (1970). *See generally* Hanks & Hanks, *supra* note 3, at 231–44; Peterson, *supra* note 3, at 50047–48.

[21] *See Calvert Cliffs'*, 449 F. 2d at 1118–19 ("It is, moreover, unrealistic to assume that there will always be an intervenor with the information, energy and money required to challenge a staff recommendation which ignores environmental costs."); Gellhorn, *Public Participation in Administrative Hearings*, Report Prepared for the Committee on Agency Organization and Procedure of the Administrative Conference of the United States 29–37 (October 29, 1971).

The danger that the review process will bog down once an initial decision has been rendered is fully recognized by the Council on Environmental Quality [22] in Section 10(b) of its Guidelines suggesting procedures for compliance with NEPA, 36 Fed. Reg. 7724 (April 23, 1971):

> "It is important that draft environmental statements be prepared and circulated for comment and furnished to the Council early enough in the agency review process before an action is taken in order to permit meaningful consideration of the environmental issues involved. To the maximum extent practicable no administrative action * * * is to be taken sooner than ninety (90) days after a draft environmental statement has been circulated for comment, furnished to the Council and * * * made available to the public * * *.

It is interesting that the Commission relies on these Guidelines to sustain its position. Initially, it directs us to Section 7 which would allow an agency, when it seeks the advice of other agencies pursuant to Section 102(2)(C), to circulate "(i) a draft environmental statement for which it takes responsibility or (ii) comparable information * * *." And, Section 2.81 (b) of the Commission's latest rules (issued after the Guidelines) provides that the applicant's draft statement "shall be deemed to be information comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental

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[22] The Council was established pursuant to Subchapter II of NEPA, 42 U.S.C. §§ 4341 *et seq.* Its duties include assisting the President in the preparation of the annual Environmental Quality Report to be transmitted to Congress and conducting investigations and developing programs concerning environmental quality.

Quality." The Commission then calls our attention to Section 10(e) of the Guidelines, which provides:

> Agencies which hold hearings on proposed administrative actions or legislation should make the draft environmental statement available to the public at least fifteen (15) days prior to the time of the relevant hearings except where the agency prepares the draft statement on the basis of a hearing subject to the Administrative Procedure Act and preceded by adequate public notice and information to identify the issues and obtain the comments provided for in sections 6–9 of these guidelines.

The Commission argues that the proviso relieves it of its obligation to prepare an environmental statement prior to the licensing hearings and that the applicant's statement, "information comparable" to a statement of its own, sufficiently identifies the issues. Although the Guidelines are merely advisory and the Council on Environmental Quality has no authority to prescribe regulations governing compliance with NEPA, we would not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies "to foster and promote the improvement of the environmental quality," NEPA § 204, 42 U.S.C.A. § 4344, has misconstrued NEPA. Although the Commission's interpretation of Section 10(e) of the Guidelines is superficially appealing, it flies in the face of Section 102(2)(C) of NEPA which explicitly requires the agency's *own* detailed statement to "accompany the proposal through the existing agency review processes." [23] There

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[23] An alternative interpretation, and one we would deem acceptable under the Act, is that the agency may hold two hearings—one solely to gather information to aid the Com-

can be no question that the hearings on PASNY's application, ordered pursuant to Section 308 of the Federal Power Act, 16 U.S.C. § 825g, and Section 1.20 of the Commission's rules, 18 C.F.R. § 1.20 (January 1, 1971), constitute an existing agency review process.

Though we conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation by *its staff* of its own impact statement,[21] we are of the view that it did not seek improperly the advice of other agencies on the basis of PASNY's application. Section 102(2)(C) compels

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mission in formulating its statements, the second to consider the merits of the license application.

It is interesting to note that the Council on Environmental Quality assumed that when the Commission circulated the PASNY report, it subsequently would circulate its own report. In its June 1971 official monthly bulletin the Council published the following notice of the PASNY report:

"Applicant's drafts. (These are not official FPC drafts. They will be followed by staff-prepared draft statements.) * * *"

[21] In its brief to this Court, the Commission argued that it would be in contravention of Section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 557, which prohibits Commission participation in the decisionmaking process until the record is completely developed, if it were required to adopt a position in an environmental impact statement. Certainly no one has suggested that the detailed statement prepared before the hearings must be prepared by the Commission members. It is sufficient for the purposes of NEPA if the statement is prepared by the Commission's staff on the basis of the staff's investigations. Counsel for the Commission conceded at oral argument that this procedure would not violate the APA. *See also* Section 6(d) of the Guidelines of the Council on Environmental Quality:

"Where an agency follows a practice of declining to favor an alternative until public hearings have been held on a proposed action, a draft environmental statement may be prepared and circulated indicating that two or more alternatives are under consideration."

the agency to seek this advice before preparing its statement. Section 102(1), however, directs that "to the fullest extent possible" regulations should be interpreted and administered in accordance with the policies of NEPA. In this regard, it would be instructive for the Commission to consult the rules of the Atomic Energy Commission, 36 Fed. Reg. 18071 (Sept. 9, 1971), promulgated after the decision in *Calvert Cliffs'* charged the AEC with a "crabbed interpretation of NEPA [which made] a mockery of the Act." 449 F. 2d at 117. The Atomic Energy Commission, although it still requires an applicant to submit its environmental report, prepares a draft report of its own in advance of seeking the advice of other federal agencies. Then, on the basis of comments received from these agencies and all interested parties, it prepares its final detailed statement, which is offered in evidence at a contested hearing.

In light of our foregoing discussion, we must consider the most efficient procedure for ensuring that the policies of NEPA are implemented in Commission proceedings on the Gilboa-Leeds line. For the reasons we have set forth, we deem it essential that the Commission's staff should prepare a detailed statement before the Presiding Examiner issues his initial decision. Moreover, the intervenors must have a reasonable opportunity to comment on the statement. But, since the statement may well go to waste unless it is subject to the full scrutiny of the hearing process, we also believe that the intervenors must be given the opportunity to cross-examine both PASNY and Commission witnesses in light of the statement. "Often individuals and groups can contribute data and insights beyond the expertise of the agency involved." *CEQ Report*, 1 Environmental L. Rep. at 50059. We leave to the Commission to determine the most efficient procedure for meeting this mandate.

Fully recognizing that delay unfortunately is incident to our mandate and PASNY's claim that the Blenheim-Gilboa project is a vitally needed power facility, we can only add our voice to that of the District of Columbia Circuit in *Calvert Cliffs'*: Delay is a concomitant of the implementation of the procedures prescribed by NEPA, and the spectre of a power crisis "must not be used to create a blackout of environmental consideration in the agency review process." 449 F. 2d at 1122. "It is far more consistent with the purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible." *Id.* at 1128.

The petitioners inform us also that the Commission has violated its comprehensive planning duties by not requiring PASNY to divulge in its environmental statement any plans it may have with respect to future power projects and transmission lines. PASNY has admitted that the Gilboa-Leeds line is part of a plan which may include three massive pumped storage hydroelectric projects, six 345 kilovolt transmission lines and three 765 kilovolt transmission lines. The Commission responds that its planning responsibility under Section 10(a) of the Federal Power Act, 16 U.S.C. §803(a),[25] does not require analysis of future projects which are not presented in license applications. PASNY adopts the benign position that it has disclosed the feasibility studies presently in progress[26] and that the Commission should take them into account in considering the Gilboa-Leeds line.

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[25] *See* note 16 *supra*.

[26] PASNY is making a study to determine the physical, environmental and economic feasibility of constructing additional pumped storage facilities downstream from the Blenheim-Gilboa project.

We cannot agree with petitioners that the Commission erred when it did not require PASNY to supplement its impact statement. NEPA places the onus of formulating the statement solely on the Commission, and unless there is any indication that the Commission's procedures will not allow it to comply with its statutory duty this Court should defer to the Commission's discretion as to the proper information gathering techniques.

In an effort to avoid any confusion or misunderstanding on remand, we are constrained to comment on the Commission's planning responsibility. Under Section 10(a) of the Federal Power Act, the Commission cannot issue a license unless the project is "best adapted to a comprehensive plan * * * for the improvement and utilization of waterpower development and for other beneficial public uses, including recreational purposes; * * *" In *Scenic Hudson I* we commented that the Commission's failure to inform itself of Consolidated Edison's future interconnection plans "cannot be reconciled with its planning responsibility under the Federal Power Act." 354 F. 2d at 622. And, less than two years later, Justice Douglas writing for the Supreme Court in *Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967), made it clear that the Federal Power Act does not command the immediate construction of as many projects as possible and that the determination whether to license any one project "can be made only after an exploration of all issues relevant to the 'public interest,' including future power demand and supply, alternate sources of power, [and] the public interest in preserving reaches of wild rivers and wilderness areas. * * *" *Id.* at 450. Although these decisions may not have

established long-range planning requirements,[*] they evidence a clear intent that the Commission at least should consider all available and relevant information in performing its functions.

The Commission's "hands-off" attitude is even more startling in view of the explicit requirement in NEPA that the Commission "recognize the worldwide and longrange character of environmental problems" and interpret its mandate under the Federal Power Act in accordance with the policies set forth in NEPA. NEPA §§ 102(1), (2)(E), 42 U.S.C.A. §§ 4332(1), (2)(E). Any doubt about the intent of these provisions is obviated by the following statement in the Senate Report accompanying the Act:

"Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

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[*] The author of this opinion has suggested that:

"* * * a major share of the blame for the unnecessary delays and ineffectual public planning in the United States may be laid at the doorstep of fragmented government regulation of power development. We sorely lack a federal agency—with sufficient authority, power and purse to choose among the infinite patterns of potential development—responsible for planning and controlling the growth and dispersal of electric generating capacity over a realistically extensive span of space and time."

Kaufman, *Power for the People—and by the People: Utilities, the Environment and the Public Interest*, 46 N.Y.U.L. Rev. 867, 872-73 (1971).

The Commission has indicated that the June 6, 1969, license of the Blenheim-Gilboa Project did not commit it to authorize construction of the Gilboa-Leeds Line. But we fail to see how the Commission, if it is to fulfill the demanding standard of "careful and informed decisionmaking," *Calvert Cliffs'*, 449 F. 2d at 1115, can disregard impending plans for further power development. For example, it may be that it would be proper to defer decision on the Gilboa-Leeds line until these plans were crystallized, particularly if there is a likelihood that future development might affect the optimum location of the line or even make the line unnecessary. Although the basic defect of current planning and licensing processes is "the inevitably narrow scope of the decision the agency [has] to make: whether or not to license a single and specific,"[28] we cannot tolerate the Commission cutting back on its expanded responsibility by blinding itself to potential developments notwithstanding its lack of authority to compel future, alternate construction.

B. Blenheim-Gilboa Project and Approved Transmission Lines

Petitioners ask us to stay construction of the pumped storage facility and the two approved transmission lines, now 80% complete, pending compliance with NEPA.[29] Although there can be no question that the Act applies to all major federal actions taken after January 1, 1970, despite the fact that construc-

[28] *Id.* at 872.

[29] Petitioners before the Commission also challenged the license and the approval of the Gilboa-New Scotland and Gilboa-Fraser lines on the ground that the Commission did not comply with the notice provisions of the Federal Power Act, and the lengthy order of October 28, 1971, deals solely with that point. Petitioners have not raised the objection here.

tion of the project under consideration may have commenced prior to that date, *see, e.g., Calvert Cliffs'*, 449 F. 2d at 1127–29 (construction permit for nuclear facility granted prior to effective date, but operating license not yet issued); *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 325 F. Supp. 728, 743–49 (E.D. Ark. 1971) (Gillham Dam to be built as part of on-going Millwood Reservoir project), we see no basis for applying NEPA retroactively [30] to the licensing of the basic project which became final nearly six months prior to the effective date of the Act. *See Pennsylvania Environmental Council* v. *Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

With respect to the Gilboa-New Scotland and Gilboa-Fraser lines, however, there can be no question that the Commission failed to comply with NEPA. The lines were approved on April 10, 1970, but the Commission failed to issue the requisite detailed environmental statement. Nevertheless, we find no compelling basis for halting construction of the lines so far advanced and decline to reopen the authorization proceedings. It is of no small consequence that petitioners, having made timely motions to intervene, offered no objections to the construction of the two lines and did not petition this Court or the District of Columbia for review within 60 days as provided by Section 313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b). Thus, construction of the lines began pursuant to a *final* order of the Commission. Although we might arrive at a different conclusion if there were significant potential for subversion of the substantive policies expressed in NEPA, *cf. Calvert Cliffs'*, 449 F. 2d at 1121 n. 28, the Commission did require PASNY in submitting its plans to "give appropriate

[30] *See generally* Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 69 Mich. L. Rev. 732 (1971).

consideration to recognized guidelines for protecting the environment"[31] and also conducted its own independent investigation of alternative routings. Moreover, it would be unreasonable to expect instant compliance with all of the Act's procedural requirements, *see id.* at 1121, and there is no indication (as there is with respect to the Gilboa-Leeds line) of obstinate refusal to comply with NEPA. *Compare Scenic Hudson Preservation Conference* v. *Federal Power Commission* [*Scenic Hudson II*], 1970 Slip Op. 5279, 5314-16 (2d Cir. Oct. 22, 1971).

II. EXPENSES AND FEES

The petitioners' final request is for an order requiring PASNY, or in the alternative the Commission, to pay the expenses and fees incurred by petitioners. Recognizing as they do that a rule requiring reimbursement of all intervenors would be subject to abuse, they limit their request to reasonable out-of-pocket expenses, including fees for experts as they are incurred, and reasonable attorneys' fees at the conclusion of the proceedings before the Commission in the event that their participation is determined to have been in the public interest.

As we read the Commission's order of October 29, 1971, the Commission denied petitioners' motion for payment of fees on the ground that it had no authority to grant them. But, in an effort to buttress its argument that the petitions for review are in this re-

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[31] *See, e.g.*, Guidelines for the Protection of Natural, Historic, Scenic, and Recreational Values in the Design and Location of Rights-of-Way and Transmission Facilities, Report of the Working Committee on Utilities of the President's Council on Recreation and Natural Beauty (Dec. 27, 1968), reprinted in Commissioner Bagge's concurrence in the June 6, 1969, license, 41 F.P.C. at 735.

gard untimely, the Commission now argues that it has foreclosed only the present award of fees and has left open the question of whether ultimately to award them when the proceedings have come to an end. Whether or not the Commission will entertain renewed motions at the close of its proceedings, we find that the petitions are timely and that this Court has jurisdiction to review the Commission's order.

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), provides that "[a]ny party to a proceeding under [the Act] aggrieved by an order issued by the Commission in such proceedings may obtain a review of such order * * *." This language, unlike those provisions limiting review to "final orders," *see, e.g.*, Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f), seemingly would allow review of all Commission orders. But the courts, sensitive to the policies underlying the requirement of exhaustion of administrative remedies, have declined jurisdiction where the issues raised could be disposed of in review of a final Commission order without serious detriment to the rights of the parties. *See, e.g., Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383–84 (1938); *Mid-American Pipeline Co.* v. *Federal Power Commission*, 299 F. 2d 126 (D.C. Cir. 1962). Review is available, however, where an interlocutory order has "an impact upon rights and [is] of such a nature as will cause irreparable injury if not challenged." *Amerada Petroleum Corp.* v. *Federal Power Commission*, 285 F. 2d 737, 739 (10th Cir. 1960) (interpreting the review provision of the Natural Gas Act, identical to Section 313 (b) of the Federal Power Act). In *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F. 2d 584 (D.C. Cir. 1971), the District of Columbia Circuit, considering the Federal Insecticide, Fungicide, and

Rodenticide Act, which provides for judicial review "[i]n a case of actual controversy as to the validity of any order" of the Secretary of Agriculture, stated that the applicable test is not whether there are further administrative proceedings available, but "whether the impact of the order is sufficiently 'final' to warrant review in the context of the particular case." *Id.* at 391. *See also Environmental Defense Fund, Inc. v. Hardin*, 428 F. 2d 1093, 1098–99 (D.C. Cir. 1970). In light of the new congressional mandates in NEPA, this test is particularly appropriate when agency action affects the environment.

In accordance with these precepts we find that the petitions are reviewable. Despite the Commission's argument that petitioners have made an inadequate showing of financial hardship, it is clear to us that a refusal to award petitioners expenses as they are incurred, particularly expenses related to production of expert witnesses, may significantly hamper a petitioner's efforts to represent the public interest before the Commission.[22] And, a retroactive award of experts' fees would be small consolation to a petitioner if the hearings are finished, the record is complete and these experts were not called because of inadequate funds.

Having determined that the petition for review is timely, we find ourselves in agreement with the Commission's position that at this posture of the proceedings and under current circumstances, without a clear congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings.

Petitioners rely on two provisions of the Federal Power Act—Sections 309 and 314(c), 16 U.S.C. §§ 825h, 825m(c)—and buttress their interpretations

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[22] *See* page 1408 & note 21 *supra*.

of those sections with the mandate in Section 102(1) of NEPA that all public laws, "to the fullest extent possible," should be interpreted in accordance with national environmental policies. Section 309 empowers the Commission "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the Federal Power Act]." Although this section, which carries the title "Administrative powers of Commission; rules, regulations, and orders," is not restricted to "procedural minutiae," *Niagara Mohawk Power Corporation* v. *Federal Power Commission*, 379 F. 2d 153, 158 (D.C. Cir. 1967) (FPC empowered to backdate a license), we perceive no basis in the terms of the provision to extend the Commission's power to include paying or awarding the expenses or fees of intervenors. We would need a far clearer congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances explicitly to provide for them when to do so was in the public interest. See Clayton Act, 15 U.S.C. § 15; Communications Act of 1934, 47 U.S.C. § 206; Interstate Commerce Act, 49 U.S.C. § 16(2).

Nor is there any basis for reaching a different conclusion with respect to counsel fees under Section 314(c) of the Federal Power Act. It provides that "[t]he Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission * * * ." The legislative history bears out the only reasonable interpretation so clear on the face of the statute: "Subsection (c) authorizes the Commission to employ such attorneys as it needs for *its* legal work." H.R. Rep. No. 1318, 74th Cong., 1st Sess. 34 (emphasis added.).

Finally, petitioners rely on the Supreme Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), which held that plaintiffs who successfully brought a derivative action under Section 14(a) of the Securities Exchange Act of 1934 were entitled to an award of costs, including counsel fees, against the corporation, even if the corporation recovered no money as a result of the action. Noting that the Securities Exchange Act did not provide for counsel fees, the Court based its decision on its equitable power to enforce the policies of the Act and to prevent unjust enrichment: "The dissemination of misleading proxy solicitations was a 'deceit practiced on the stockholders as a group,' *J. I. Case Co.* v. *Borak*, 377 U.S. at 432, and the expenses of petitioner's lawsuit have been incurred for the benefit of the corporation and the other shareholders." 396 U.S. at 392. Whether or not *Mills* could support such an award as petitioners seek without a more specific congressional mandate,[33] we do not find compelling need for it at this point, in view of our direction as to the role required of the Commission here.

Fully mindful that petitioners invoke our equitable powers, we cannot ignore parallel developments in this rapidly changing area of administrative law. As recently as December 7, 1971, the Administrative Conference of the United States refused to adopt a recommendation which would have endorsed the principle of reimbursing the legal expenses incurred by intervenors in administrative proceedings. The Conference, however, did adopt a recommendation which would oblige agencies to minimize filing and distribution requirements, to minimize the costs of obtaining

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[33] *See* Note, *The Allocation of Attorneys Fees after Mills* v. *Electric Auto-Lite*, 38 U. Chi. L. Rev. 316, 329–30 (1971).

transcripts, to make available the agency's technical files and to experiment with allowing access to their staff as advisers and witnesses. Recommendation 28, Public Participation in Administrative Hearings § D, adopted December 7, 1971. Without a showing of compelling need, it would be premature for us to inject the federal courts into this area of administrative discretion, perhaps foreclosing more flexible approaches through agency action or rules.

The petitions for review are granted in part and denied in part, and the case is remanded for further proceedings in accordance with this opinion.

APPENDIX B

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of January, one thousand nine hundred and seventy-two.

Present: Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. William H. Mulligan, *Circuit Judges.*

Greene County Planning Board, petitioner

v.

Federal Power Commission, respondent

Town of Durham, New York and Association for the Preservation of Durham Valley, Power Authority of the State of New York, The Sierra Club, intervenors

Petitions for review of orders of the Federal Power Commission.

This cause came on to be heard on the administrative record of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the said petitions be and they hereby are granted in part and denied in part and that the actions be and they hereby are remanded to said Federal Power Commission for further proceedings in accordance with the opinion of this court.

A. Daniel Fusaro,
Clerk.

APPENDIX C

71–1991 & 71–1196

United States Court of Appeals for the Second Circuit

GREENE COUNTY PLANNING BOARD, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, POWER AUTHORITY OF THE STATE OF NEW YORK, INTERVENORS

A petition for a rehearing having been filed herein by the Federal Power Commission,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. JOSEPH SMITH,
IRVING R. KAUFFMAN,
WILLIAM H. MULLIGAN.

MARCH 10, 1972.

71–1991 & 71–1196

United States Court of Appeals, Second Circuit

GREENE COUNTY PLANNING BOARD, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, POWER AUTHORITY OF THE STATE OF NEW YORK, INTERVENORS

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the Federal Power Commission and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY,
Chief Judge.

MARCH 10, 1972.

APPENDIX D

United States of America, Federal Power Commission

(18 CFR 2.80, 2.81, 2.82, and 4.41)

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* JOHN A. CARVER, JR., ALBERT B. BROOKE, JR., and PINKNEY WALKER.

IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Docket No. R–398

Order No. 415–B

Order amending sections 2.80, 2.81, 2.82, of the General Rules and section 4.41 of the regulations under the Federal Power Act

(Issued November 19, 1971)

On December 4, 1970, the Commission issued Order No. 415 (35 F.R. 18958, December 15, 1970) which prescribed §§ 2.80–2.82 of its General Policy and Interpretations (18 CFR 2.80–2.82) and various related amendments to the Commission's Regulations under the Federal Power and Natural Gas Acts. On April 13, 1971, the Commission issued its Order No. 415–A (36 F.R. 7232, April 16, 1971) further clarifying the procedures in § 2.81 and § 2.82. Experience in applying these Regulations, as amended, and the Final Guidelines of the Council on Environmental Quality (36 F.R. 7724) demonstrated the desirability of once again

proposing revisions to the Commission's Regulations for Implementation of the National Environmental Policy Act of 1969 (83 Stat. 852).

Accordingly, on July 7, 1971, (36 F.R. 13040, July 13, 1971) the Commission issued a notice of proposed rulemaking to amend §§ 2.80–2.82 of its "Statement of General Policy to Implement Procedures for Compliance with the National Environmental Policy Act of 1969", and § 4.41 of the Commission's Regulations under the Federal Power Act. All interested persons were invited to submit comments for consideration in connection with the proposed amendments on or before August 9, 1971. A total of twelve comments were received.[1]

Many of the comments received were objections to Order No. 415 and not to the changes proposed in our July 7, 1971, notice.

Several comments expressed concern that the time limitations specified in the proposed § 2.80(c)(i)[2] would unduly delay procedures. This provision was

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[1] Timely comments filed on or before August 9, 1971 were submitted by: Columbia Gas System Service Corporation; Consolidated Edison Company of New York, Inc.; Edison Electric Institute; Kafin and Needleman; Chris C. Oynes; Pacific Gas and Electric Company; Pennsylvania Power & Light Company; Phillips Petroleum Company; Southern California Edison Company; and Southern Natural Gas Company.

Late filings were made by Virginia Electric and Power Company (filed August 11, 1971); and the Northern Natural Gas Company (filed August 23, 1971).

We have considered all the filings made in this docket.

[2] The proposed § 2.80(c)(i) stated:

"To the maximum extent practicable no administrative action is to be taken sooner than ninety days after a draft environmental statement has been circulated for comment and thirty days after the final text of our environmental statement has been made available to the Council on Environmental Quality and the public."

added as a result of the recommendation contained in paragraph 10(b) of the Guidelines of the Council on Environmental Quality. It should be pointed out that these Guidelines are advisory. Our rulemaking procedures for compliance with the National Environmental Policy Act are subject to the provisions of the Administrative Procedure Act and must meet its requirements. Accordingly, after careful consideration, the Commission has determined that no significant delay need result from this limitation. However, for purposes of clarification, it is ordered that § 2.80(c)(i) be changed to read as follows:

> (c)(i) Except as authorized by the Commission no action to construct a facility licensed or certificated by Commission is to be taken sooner than ninety days after a draft environmental statement has been circulated for comment or thirty days after the final text of an environmental statement has been made available to the Council on Environmental Quality and the public.

Section 2.81(b) as promulgated, in Order 415, issued December 4, 1970 (35 F.R. 18958) requires each applicant as described in § 2.81(a) to submit a detailed statement of environmental factors along with its application. The Commission, in order to assist other government agencies and other interested parties in complying with the provisions of § 4(e) of the Federal Power Act (41 Stat. 1065–1066; 49 Stat. 840–841; 61 Stat. 501; 16 U.S.C. 797(e) and § 102(2)(C) of the National Environmental Policy Act (83 Stat. 853) and to facilitate publication of legal notices, has determined that it is desirable to make the applicant's environmental impact statement a self-contained exhibit to the application.

One comment expressed the concern that amending the Commission's Regulations so as to have § 4.41 specify a new Exhibit W (the applicant's environmental impact statement) will involve unnecessary duplication of information required both in certain exhibits [3] to the application and the applicant's environmental impact statement. It should be pointed out that Exhibit W must be "self-contained". The applicant, if it so desires, is free to incorporate by reference in the environmental impact statement information required by other exhibits provided that such exhibits or pertinent extracts therefrom are attached to the environmental impact statement.

Since the promulgation of Order No. 415 the Commission has sent all § 102(2)(C) referrals to the Environmental Protection Agency. However, §§ 2.81 and 2.82 of Part 2, Subchapter A of 18 CFR have not explicitly designated the Environmental Protection Agency and the Commission, through experience in applying these provisions, has determined that it is desirable that government agencies submitting these referrals provide the applicant and the other parties to the proceeding with a copy. Therefore, the Commission is amending the relevant portions of those sections by specifically naming the Environmental Protection Agency, the applicant, and the other parties to the proceeding.

The final guidelines of the Council on Environmental Quality recommend that "wherever an agency action related to air or water quality * * * or other provisions of the authority of the Administrator * * *" [of the Environmental Protection Agency

[3] Exhibit H requires a complete study of the hydrological effect of project operation; Exhibit S requires a complete study of the effect on fish and wildlife of project operation.

(EPA)] the Administrator shall be allowed 45 days to make his § 102(2)(C) comment. It is felt that there is no reason to allow EPA 45 days for their comments while limiting all other parties to a 30-day period. Therefore we have adopted a 45-day period in lieu of our earlier 30-day period for EPA and all others wishing to submit comments.

The purpose of the changes in §§ 2.81(b) and 2.82(b) is to clarify our procedures in regard to the preparation and circulation of environmental statements. For purposes of circulation for comment as required by § 102(2)(C) of the National Environmental Policy Act, the applicant's statement, as modified by § 2.81(b) and § 2.82(b), will serve as the agency draft statement, in accord with the recommendations of the Council on Environmental Quality in Section 7 of the Guidelines. Again, it should be pointed out that these Guidelines are recommendations, and that our procedures are governed by the Administrative Procedure Act. The procedures herein prescribed are more comprehensive than those recommended in the Guidelines.

This statement, with its attendant comments, will serve to delineate the issues upon which environmental evidence will be presented at the hearing. This will, of course, subject the initial statement to considerable analysis and possibly modification by the staff and all other parties, both during hearing and, after the environmental evidence has been fully developed, at the briefing stage.

We have decided that each applicant for a certificate within the scope of § 2.82(a) shall file an environmental statement as a part of its application. By this order we are deleting the abbreviated procedures pre-

viously available under § 2.82(b). Accordingly §§ 2.81 (b) and 2.82(b) are amended to read as follows:

2.81(b) All applications covered by paragraph (a) of this section shall be accompanied by Exhibit W, the applicant's detailed statement of the environmental factors specified in § 2.80 and § 4.41. The staff shall make an initial review of the applicant's statement and issue, if necessary, any deficiency letters as to sufficiency of form. If it appears, based upon the application and the detailed statement, and a preliminary review thereof by staff, that the proposed action may be a major federal action significantly affecting the quality of the human environment, then staff shall cause the applicant's statement, as revised, to be made available to all interested governmental bodies and to the public for comments. For purposes of § 2.81, the applicant's draft statement, as modified pursuant to (b) of this section, shall be deemed to be information comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental Quality. The Secretary of the Federal Power Commission shall cause prompt publication in the Federal Register of notice of availability of the applicant's statement, as modified pursuant to (b). A period of 45 days shall be afforded in which to submit written comments. The applicant shall, as requested supply twenty-five copies or more of the statement, as revised (each copy to be accompanied by such supporting papers as are necessary) to the Federal Power Commission.

2.82(b) All applications covered by paragraph (a) of this section shall be accompanied by the applicant's detailed statement of the environmental factors specified in § 2.80. The staff shall make an initial review of the applicant's statement and issue, if necessary, any deficiency letters as to sufficiency of form. If it appears,

based upon the application and the detailed statement, and a preliminary review thereof by staff, that the proposed action may be a major federal action significantly affecting the quality of the human environment, then staff shall cause the applicant's statement, as revised, to be made available to all interested governmental bodies and to the public for comments. For purposes of § 2.82, the applicant's draft statement, as modified pursuant to (b) of this section, shall be deemed to be information comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental Quality. The Secretary of the Federal Power Commission shall cause prompt publication in the Federal Register of notice of availability of the applicant's statement, as modified pursuant to (b). A period of 45 days shall be afforded in which to submit written comments. The applicant shall, as requested, supply twenty-five copies or more of the statement, as revised (each copy to be accompanied by such supporting papers as are necessary) to the Federal Power Commission.

Wording in §§ 2.81(c) and 2.82(c) has been changed to reflect the changes in §§ 2.81(b) and 2.82(b). In addition, in order to clarify the status of the comments of the Environmental Protection Agency and the Council on Environmental Quality, the final sentence of §§ 2.81(c) and 2.82(c) is transferred to the final sentences of §§ 2.81(c) and 2.82(c). Accordingly, §§ 2.81(c) and 2.28(c) are modified to read as follows:

All interveners taking a position on environmental matters shall file comments on the draft statement with the Commission including an explanation of their environmental position, specifying any differences with the applicant's detailed statement upon which intervener wishes to be heard and including therein a discussion of that position in the context of the factors

enumerated in § 2.80, at a time specified by the Commission or the Presiding Examiner. All interveners shall be responsible for filing ten copies of their filing with the Council on Environmental Quality and at least one copy with the Environmental Protection Agency at the time they file with the Commission and shall also supply a copy of such filing to all participants to the proceeding. Nothing herein shall preclude an intervener from filing a detailed environmental statement. The comments of the Council on Environmental Quality, and the Environmental Protection Agency, if any, should be made in a written statement served upon the Commission's Secretary and all parties of record.

To further carry out our procedural implementation of the National Environmental Policy Act, to bring uniformity to our procedures, and to assure equal and adequate environmental consideration of all applications filed pursuant to §§ 2.81 and 2.82 of part 2, Subchapter A of 18 CFR, the separate procedures set forth in §§ 2.81(f) and 2.82(f) for handling noncontested cases are hereby deleted. Henceforth all cases described above will be handled in the same manner.

Sections 2.81(g) and 2.82(g) are redesignated as §§ 2.81(f) and 2.82(f).

The Commission finds:

(1) The revisions to the statement of policy herein adopted result from review and consideration of the comments and suggestions received in response to the notice of proposed rulemaking issued July 7, 1971. However, these revisions differ in some respects from those proposed in that notice. In view of the great importance and urgency of environmental problems, it is essential that the Commission promulgate these

procedures respecting environmental statements at this time. For the foregoing reasons, further compliance with the notice, public procedure and effective date provisions of 5 U.S.C. is impracticable and contrary to the public interest and good cause exists that the Commission adopt the revisions to the statement of policy set out in this order without further notice and public procedure and that the revisions herein adopted become effective upon the issuance of this order.

(2) The amendments to the Commission's General Rules and Regulations under the Federal Power Act adopted herein are necessary and appropriate for carrying out the provisions of the Federal Power Act, the Natural Gas Act, and the National Environmental Policy Act;

(3) Good cause exists that the amendments herein adopted become effective upon the issuance of this order.

The Commission acting pursuant to the provisions of the Federal Power Act, particularly sections 4, 10, 15, 307, 309, 311 and 312 (41 Stat. 1065, 1066, 1068, 1069, 1070, 1072; 46 Stat. 798, 49 Stat. 839, 840, 841, 842, 843, 844, 856, 857, 858, 859, 860, 61 Stat. 501, 82 Stat. 617; 16 U.S.C. 797, 803, 808, 825f, 825h, 825j, 825k), and the Natural Gas Act, particularly sections 7 and 16 (52 Stat. 824, 825, 830, 56 Stat. 83, 84; 61 Stat. 459; 15 U.S.C. 717f, 717o), and the National Environmental Policy Act of 1969, P.L. 91–190, approved January 1, 1970, particularly sections 102 and 103 (83 Stat. 853, 854) orders:

(A) The Statements of General Policy to implement procedures for compliance with the National Environmental Policy Act of 1969 in Part 2—General Policy and Interpretations is revised to read as follows:

STATEMENT OF GENERAL POLICY TO IMPLEMENT PROCEDURES FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

§ 2.80 *Detailed Environmental Statement.*

(a) It shall be the general policy of the Federal Power Commission to adopt and to adhere to the objectives and aims of the National Environmental Policy Act of 1969 (Act) in its regulation under the Federal Power Act and the Natural Gas Act. The National Environmental Policy Act of 1969 requires, among other things, a detailed environmental statement in all major Federal actions and in all reports and recommendations on environmental legislative proposals which will significantly affect the quality of the human environment.

(b) Therefore, in compliance with the National Environmental Policy Act of 1969 we will make a detailed environmental statement when the regulatory action taken by us under the Federal Power Act and Natural Gas Act will have such significant environmental impact. A "detailed statement" prepared in compliance with the requirements of §§ 2.81 through 2.82 of this Part shall fully develop the five factors listed hereinafter in the context, among other relevant environmental factors, of such considerations as the proposed activity's direct and indirect effect on the ecology of the land, air and water environment of the project or natural gas pipeline facility, and on aquatic and wildlife, and established park and recreational areas, on sites of natural, historic, and scenic values and resources of the area, on secondary significant environmental effects of the proposed activity and the conformity of the proposed activity with all applicable environmental standards. Such statement should also deal with the alternatives as compared with the proposal. The above factors are listed to merely illustrate the kinds of values that must be considered in

the statement; in no respect is this listing to be construed as covering all relevant factors.

(1) the environmental impact of the proposed action,

(2) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(3) alternatives to the proposed action,

(4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

(c)(i) Except as authorized by the Commission no action to construct a facility licensed or certificated by the Commission is to be taken sooner than ninety days after a draft environmental statement has been circulated for comment or thirty days after the final text of an environmental statement has been made available to the Council on Environmental Quality and the public.

(c)(ii) Upon a finding that it is necessary and appropriate in the public interest the Commission may dispense with any time period specified in §§ 2.80–2.82.

§ 2.81 *Compliance With the National Environmental Policy Act of 1969 Under Part I of the Federal Power Act.*

(a) A notice of all applications for major projects (those in excess of 2,000 horsepower) or for reservoirs only providing regulatory flows to down-stream (major) hydroelectric projects under Part I of the Federal Power Act for license or relicense, or amendment to license proposing construction or operating change in project works will be transmitted by the Commission to the Council on Environmental Quality, Environmental Protection Agency, and to appropriate governmental bodies, Federal, regional, State and local with

a request for comments on the environmental considerations listed in § 2.80 of this Part. Notice of all such applications shall also be made as prescribed by law.

(b) All applications covered by paragraph (a) of this section shall be accompanied by Exhibit W, the applicant's detailed statement of the environmental factors specified in § 2.80 and § 4.41. The Staff shall make an initial review of the applicant's statement and issue, if necessary, any deficiency letters as to sufficiency of form. If it appears, based upon the application and the detailed statement, and a preliminary review thereof by staff, that the proposed action may be a major federal action significantly affecting the quality of the human environment, then staff shall cause the applicant's statement, as revised, to be made available to all interested governmental bodies and to the public for comments. For purposes of § 2.81, the applicant's draft statement, as modified pursuant to (b) of this section, shall be deemed to be information comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental Quality. The Secretary of the Federal Power Commission shall cause prompt publication in the Federal Register of notice of availability of the applicant's statement, as modified pursuant to (b). A period of 45 days shall be afforded in which to submit written comments. The applicant shall, as requested, supply twenty-five copies or more of the statement, as revised (each copy to be accompanied by such supporting papers as are necessary) to the Federal Power Commission.

(c) All interveners taking a position on environmental matters shall file comments on the draft statement with the Commission including an explanation of their environmental position, specifying any differences with the applicant's detailed statement upon which intervener wishes

to be heard and including therein a discussion of that position in the context of the factors enumerated in § 2.80, at a time specified by the Commission or the Presiding Examiner. All interveners shall be responsible for filing ten copies of their filing with the Council on Environmental Quality and at least one copy with the Environmental Protection Agency at the time they file with the Commission and shall also supply a copy of such filing to all participants to the proceeding. Nothing herein shall preclude an intervener from filing a detailed environmental statement. The comments of the Council on Environmental Quality, and the Environmental Protection Agency, if any, should be made in a written statement served upon the Commission's Secretary and all parties of record.

(d) The applicant, staff, and all interveners taking a position on environmental matters should offer evidence for the record in support of their environmental position, filed in compliance with the provisions of this section.

(e) In the case of each contested application the initial and reply briefs filed by the applicant, the staff, and all interveners taking a position on environmental matters should specifically analyze and evaluate the evidence in the light of the environmental criteria enumerated in § 2.80.

Furthermore, the Initial Decision of the Presiding Examiner in such cases shall include an evaluation of the environmental factors enumerated in § 2.80 and the views and comments expressed in conjunction therewith by the applicant and all those making formal comment pursuant to the provisions of this section. If the Commission grants the application, its final order shall include a final detailed environmental statement as specified in § 2.80.

(f) Ten copies of all comments from governmental bodies—Federal, regional, State, and

local—made pursuant to this section shall also be transmited to the Council on Environmental Quality and at least one copy shall be transmitted to the Environmental Protection Agency, to the applicant, and to the parties to the proceeding within 15 days of Commission grant of intervention by the party filing such comments.

§ 2.82 *Compliance With the National Environmental Policy Act of 1969 Under the Natural Gas Act.*

(a) A notice of all certificate applications filed under Section 7(c) of the Natural Gas Act (15 U.S.C. 717f(c)), except abbreviated applications filed pursuant to Section 157.7(b), (c), (d), and (e) of the Commission Regulations, will be transmitted by the Commission to the Council on Environmental Quality and the Environmental Protection Agency. Notice of all certificate applications will continue to be published as prescribed by law, and transmitted to other appropriate Federal and State governmental bodies.

(b) All applications covered by paragraph (a) of this section shall be accompanied by the applicant's detailed statement of the environmental factors specified in § 2.80. The staff shall make an initial review of the applicant's statement and issue, if necessary, any deficiency letters as to sufficiency of form. If it appears, based upon the application and the detailed statement, and a preliminary review thereof by staff, that the proposed action may be a major federal action significantly affecting the quality of the human environment, then staff shall cause the applicant's statement, as revised, to be made available to all interested governmental bodies and to the public for comments. For purposes of § 2.82 the applicant's draft statement, as modified pursuant to (b) of this section, shall be deemed to be in-

formation comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental Quality. The Secretary of the Federal Power Commission shall cause prompt publication in the Federal Register of notice of availability of the applicant's statement, as modified pursuant to (b). A period of 45 days shall be afforded in which to submit written comments. The applicant shall, as requested, supply twenty-five copies or more of the statement, as revised (each copy to be accompanied by such supporting papers as are necessary) to the Federal Power Commission.

(c) All interveners taking a position on environmental matters shall file comments on the draft statement with the Commission including an analysis of their environmental position, specifying any difference with the applicant's detailed statement upon which intervener wishes to be heard and including therein a discussion of that position in the context of the factors enumerated in § 2.80, at a time specified by the Commission or the Presiding Examiner. All interveners shall be responsible for filing ten copies of their filing with the Council on Environmental Quality, and at least one copy with the Environmental Protection Agency at the time they file with the Commission and shall also supply a copy of such filing to all participants to the proceeding. Nothing herein shall preclude an intervener from filing a detailed environmental statement. The comments of the Council on Environmental Quality, and the Environmental Protection Agency, if any, should be made in a written statement served upon the Commission Secretary and all parties of record.

(d) The applicant, staff, and all interveners taking a position on environmental matters should offer evidence for the record in support of their environmental position, filed in compliance with the provisions of this section.

(e) In the case of each contested application the initial and reply briefs filed by the applicant, the staff, and all interveners taking a position on environmental matters should specifically analyze and evaluate the evidence in the light of the environmental criteria enumerated in § 2.80.

Furthermore, the Initial Decision of the Presiding Examiner in such cases shall include an evaluation of the environmental factors enumerated in § 2.80 and the views and comments expressed in conjunction therewith by the applicant and all those making formal comment pursuant to the provisions of this section. If the Commission grants the application, its final order shall include a final detailed environmental statement as specified in § 2.80.

(f) Ten copies of all comments from governmental bodies—Federal, regional, State and Local—made pursuant to this section shall also be transmitted to the Council on Environmental Quality and at least one copy shall also be transmitted to the Environmental Protection Agency, to the applicant and to the parties to the proceeding within 15 days of Commission grant of intervention by the party filing such comments.

(B) The Commission amends § 4.41 Required Exhibits in Part 4, Subchapter B, Regulations under the Federal Power Act, Chapter I, Title 18 of the Code of Federal Regulations by adding immediately following Exhibit V, a new paragraph entitled Exhibit W to read as follows:

§ 4.41 Required Exhibits

* * * * *

Exhibit W. Applications covered by 18 CFR 2.81(a) shall be accompanied by an applicant's environmental statement. Such statement shall comply with the detailed requirements set down

in 18 CFR 2.80–2.81, and shall include a one-page summary of the statement. Furthermore, such statement with its supporting papers shall be self-contained.

(C) The amendments adopted herein shall be effective upon issuance of this order.

(D) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

[SEAL] KENNETH F. PLUMB,
Secretary.

467-518—72——5

APPENDIX E

United States of America, Federal Power Commission

Power Authority of the State of New York

Project No. 2685

Before Commissioners: John N. Nassikas, *Chairman;* John A. Carver, Jr., Albert B. Brooke, Jr., and Pinkney Walker.

ORDER DENYING MOTIONS AND APPEALS

(Issued October 29, 1971)

On June 6, 1969, the Commission granted a license to the Power Authority of the State of New York (PASNY) to construct and operate the Blenheim-Gilboa Pumped Storage Project No. 2685 including, as part of the project works, three 345 Kv transmission lines (41 FPC 712). While the license authorized construction of the project generally, Article 34 thereof specifically prohibited construction of the transmission lines until further Commission approval was given.

On November 24, 1969, PASNY applied for construction authorization under Article 34, filing exhibits showing the proposed designs and locations of the three transmission lines, one of which was to run from Gilboa, in Schoharie County, past Durham to the Leeds substation near Catskill, all in Greene County. On or about December 11, 1969, the Commission gave written notice of such application to Durham

and Greene County, among other municipalities, and commenced publishing notice in a newspaper published in Greene County, among other newspapers. Additionally, on December 18, 1969, the Commission published notice in the Federal Register (34 F.R. 19838).

Petitions to intervene were filed in January and February 1970 by Greene County Planning Board (Greene County); Town of Durham and Association for the Preservation of Durham Valley (collectively, Durham); Brooks Atkinson, Marshall Bell, Barry H. Garfinkel, Alfred Gelhorn, Arthur Goldschmidt, Walton McClure, Earl Morse, and Agnes O'Neil (collectively, Individual Intervenors); and Sierra Club.

On April 10, 1970, the Commission approved the application and exhibits insofar as they related to the two lines as to which no protests or petitions were filed, but it reserved consideration of the Gilboa-Leeds line (43 FPC 521). On May 19, 1970, the Commission granted all of the petitions to intervene including one which had been filed by Joe Segelman in February 1970.

After meeting with various persons interested in the affected area, and following additional studies, PASNY filed with the Commission on December 4, 1970, two alternative proposals for routing the Gilboa-Leeds transmission line. On or about January 13, 1971, the Commission again gave written notice to Durham and Greene County, among other municipalities, and commenced publishing notice in a newspaper published in Greene County, among other newspapers. Additionally, on January 22, 1971, the Commission again published notice in the Federal Register (36 F.R. 1074). On March 26, 1971, PASNY filed with the Commission and transmitted to the Intervenors its Environmental Report showing, among other mat-

ters, three possible variations of the two alternative proposals.

APPEAL FROM DENIAL OF MOTIONS FOR AWARD OF COUNSEL FEES AND EXPENSES

At a pre-hearing conference on June 22, 1971, Durham made a motion, which was joined by Greene County, for an order that the Commission, or alternatively, PASNY, pay or undertake to pay said Intervenors' expenses including counsel fees in the proceeding, to provide said Intervenors with copies of the transcripts of the proceeding without charge, and for other appropriate relief. Presiding Examiner William C. Levy denied the motion on the basis that *he* did not have authority to grant the relief requested. On July 2, 1971, Durham filed a Notice of Appeal to the Commission and, on August 9, 13 and 16, 1971, Durham, Greene County and Sierra Club, respectively, filed memoranda in support of said motion and appeal.

In its memorandum, Durham qualified its request, insofar as counsel fees are concerned, to such ". . . fees as the Commission may, at the conclusion of the proceeding, find have 'in fact been in the public interest.'" Sierra Club indicated that counsel fees and expenses should be awarded ". . . at the discretion of the Commission at the conclusion of the proceeding, based on the extent and value of the public services rendered by the Intervenors." While both of them request without elaboration that the motion be granted at an early date to enable Intervenors to prepare for the hearing, it is difficult to conceive how it would help particular Intervenors to prepare for the hearing if we should do as we are asked—to presently indicate that one or more Intervenors might

receive an indefinite sum based upon our future judgment as to the value of the public services rendered by the particular Intervenor(s). We doubt that such approach would secure contingent fee counsel or witnesses, and it certainly would not pay current expenses.

The central theme of all three memoranda is that the Intervenors represent the public interest, desire to assist the Commission, lack substantial financial resources to do so and, like PASNY, which has substantial resources, should be in a position ultimately to pass the costs of the proceeding to the public. All three memoranda rely in varying degrees upon the National Environmental Policy Act of 1969 (NEPA). In a memorandum filed on September 21, 1971, PASNY supported the Presiding Examiner asserting that there is no statutory or other authority to grant the requested relief.

Durham points to the broad authority given to the Commission in the Federal Power Act, as amended, including the authority in Section 309 "to perform any and all acts . . . necessary or appropriate to carry out the provisions of this Act", and in Section 314(c) to "employ such attorneys as it finds necessary . . . for proper representation of the public interests. . . ." While we do not dispute that these provisions give us broad authority to carry out our functions, including representation of numerous public groups and individuals with a variety of interests which sometimes compliment, and sometimes compete with, one another, they do not provide the broad authority, which Durham suggests, to transfer our operating funds to others in order to finance their activities in proceedings before this Commission.

Durham also asserts that under the "Supreme Court's recent landmark opinion" in *Mills* v. *The*

Electric Auto-Lite Company, 396 U.S. 375 (1970), it is appropriate for the Commission "under equitable principles to grant attorney fees without explicit statutory authority to do so." But *Mills* is a shareholders' action which, in order to avoid the unjust enrichment of those who benefitted from legal proceedings, permits the costs of such proceedings to be shifted to the beneficiaries; a footnote suggests that costs should be shifted only after the successful conclusion of a proceeding which results in a significant service. While the activities of particular Intervenors in the present proceeding involving the Gilboa-Leeds transmission line may ultimately result in a significant public service in the context of the local community such as the Town of Durham or Greene County, such service may not be significant in the context of the multiple, and sometimes larger, segments of the public served by this Commission.

Greene County asserts that while § 2.81 of the Commission's Rules of Practice and Procedure, implementing NEPA, requires both applicants and the Commission staff to file detailed environmental statements in uncontested proceedings, the Commission staff is not required to file such statements in contested proceedings. Instead, Greene County continues, § 2.81(c), requiring intervenors to file explanations of environmental positions, shifts the burden to them to analyze environmental impact in contested proceedings and, consequently, the Commission should finance those upon whom the burden is shifted.

While it is true that the Commission staff is not required to file detailed environmental statements in contested proceedings, it does not follow that intervenors are entitled to funds with which to prepare explanations of environmental positions. The Commission staff is required by *Scenic Hudson Preservation*

Conference v. *Federal Power Commission*, 354 F.2d 608 (1965), to make every effort to assure that the records of licensing proceedings are complete for the purpose of enabling the Commission to make judgments under the Federal Power Act and the National Environmental Policy Act of 1969 and ultimately include detailed environmental statements in its final orders. For this reason, the staff frequently goes to great lengths to make sure that different points of view and interests are fully represented in the record.

In Docket No. R–389A a consumer group filed a motion to be allowed an initial $10,000 payable by the Commission to enable the group to secure counsel and act as a public interest and consumer surrogate in lieu of the Commission. In our Orders dated August 28 and October 23, 1970, we denied the motion and a motion for rehearing, stating that "the Commission has not and will not abdicate its mandate to represent the public interest." In the latter Order we also rejected the argument that "anyone claiming to represent a consumer group should be permitted to intervene at Commission expense irrespective of the resources available to that person." While Durham and Greene County claim that they are seeking funds to assist, rather than to act in lieu of, the Commission, our policy not to abdicate our mandate to represent the public interest is equally applicable to them, and nothing in NEPA appears to require departure in this instance therefrom.

The only sworn statements in the record bearing upon the ability of any Intervenors to pay for transcripts or other expenses of the proceeding are contained in the personal affidavit dated August 4, 1971, of Barry H. Garfinkel, Esquire (Garfinkel), counsel for Durham, as follows: (1) that for 1971 the Town of Durham budgeted "$800 for its normal legal fees and expenses and is unable to allocate any monies for this proceeding",

and (2) "The Association for the Preservation of Durham Valley, an unincorporated association, with approximately 100 members, has only $50 in its bank account."

While we have not treated Garfinkel's affidavit as an application for leave to proceed *in forma pauperis*, the foregoing statements raise, rather than answer, questions respecting the resources available to such Intervenors. If Garfinkel, or any other Intervenor, desires copies of transcripts without charge, he may seek leave to proceed *in forma pauperis* by filing his affidavit together with those of each of his client-intervenors demonstrating their inability to purchase the portions of the transcripts pertinent to their respective interests.

APPEAL FROM DENIAL OF MOTION FOR ORAL NON-EXPERT TESTIMONY

On June 22, 1971, Presiding Examiner Levy also denied Durham's oral motion that its non-expert witnesses be permitted to testify at the hearing in person without the necessity of the prior filing of prepared written testimony, directing that all expert and non-expert testimony be filed in prepared written form in order to permit all participants to read the testimony prior to, and thereby facilitate and expedite, the hearing. On August 24, 1971, Durham filed a Notice of Appeal, in substance repeating its oral motion and asking that the Commission vacate those portions of the Presiding Examiner's June 22nd ruling and Notice dated August 6, 1961, as require that prepared written testimony of Intervenors' witnesses be submitted by November 2, 1971. Durham relies upon §1.22(a) of the Commission's Rules of Practice and Procedure which states that witnesses *shall* be examined orally unless a deposition is taken or a stipula-

tion is made by consent, or unless the Presiding Examiner orders that direct expert testimony be reduced to prepared written testimony.

It has become the practice in Commission proceedings that the direct testimony of substantially all witnesses, both lay and expert, be reduced to prepared written form; where the Presiding Examiner determines (e.g., due to the number of intervenors) that it is appropriate to control the receipt of testimony in order to facilitate and expedite a hearing, as he did in this case, he may and should order that the proposed direct testimony of non-expert witnesses be reduced to prepared written form. Subject to his continued control of the proceeding, it would be appropriate for the Presiding Examiner, upon motion at the hearing, to permit such lay witnesses to withdraw their prepared written testimony and testify orally as to those matters which were covered thereby and, subject further to a showing of good cause, to testify as to other relevant matters.

> We may add to the above discussion that it is much to be regretted that this Commission's time should be taken up with an appeal of this sort * * *. The litigation before this Commission ordinarily concerns matters of broad public interest, and it is expected that controversies on minor procedural matters be resolved with some spirit of accommodation and in a businesslike manner or by reference to the Examiner, who is far better acquainted with the situation than this Commission. *Indiana & Michigan Electric Company* and *Ohio Power Company,* 39 FPC 610, 612.

The foregoing passage is equally applicable to this appeal. The Commission's Rules of Practice and Procedure do not contemplate that a participant should appeal a Presiding Examiner's ruling on a procedural

matter simply on the basis of dissatisfaction. After an Examiner is designated by the Commission to preside at a hearing, procedural matters relating thereto should be considered and ruled upon by such Examiner pursuant to §§ 1.12(d) and 1.27(b)(7) both before and during the hearing. Motions before or during the hearing involving or constituting final determination of the proceeding, including motions during the hearing involving dismissal of the proceeding, are exclusively within the province of the Commission except where they are ruled upon as part of the Examiner's initial or recommended decision. All other motions before the hearing where immediate ruling is essential in order to proceed with the hearing, and all other motions during the hearing and prior to the submission of the Examiner's initial or recommended decision, should be considered and ruled upon by the Examiner, but may also be ruled upon by the Commission. While the Examiner may, within his discretion, refer any motions or certify any questions to the Commission, his rulings may not be appealed during the course of hearings or conferences except in extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest. Accordingly, the Commission will not reconsider an Examiner's ruling on a procedural matter unless the Examiner declines to rule upon the matter and refers or certifies it to the Commission, or unless the matter is appealable under § 1.28(a) as involving extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest.

We view Durham's motion as involving a procedural matter which is exclusively within the province of the Presiding Examiner. Since there is no showing that prompt decision by us is necessary to prevent

detriment to the public interest, and particularly since the motion may be renewed at the hearing insofar as requests may be made that particular non-expert witnesses be permitted to testify orally, reconsideration will be denied.

APPEALS FROM DENIAL OF MOTIONS FOR SCHEDULING DELAYS

On June 22, 1971, Presiding Examiner Levy set August 24, 1971, as the final date for filing PASNY's direct case; September 6, 1971, as the final date for filing Intervenors' statements of environmental positions and for receiving comments on PASNY's Environmental Report (detailed environmental statement); September 28, 1971, as the final date for filing Intervenors' direct cases, and October 5, 1971, as the commencement date of the public hearing. On July 21, 1971, PASNY filed a motion to extend from August 24, 1971, to September 28, 1971, the final date for filing its direct case, and to extend for a similar five week period (to November 2, 1971) the final date for filing Intervenors' direct cases. On July 29 and August 2, 1971, Durham and Greene County, respectively, filed replies in partial opposition. Durham asked that the final date for filing PASNY's direct case be set at 30 days after the Commission determines its foregoing motions to revoke the project license and to award counsel fees and expenses together with another motion to produce certain documents. Greene County proposed its own schedule based in part upon a claimed necessity of revising and recirculating PASNY's detailed environmental statement, and in part upon a claimed necessity of the Commission filing and circulating a detailed environmental statement. By Notice dated August 6, 1971,

Presiding Examiner Levy granted PASNY's motion and denied Durham's and Greene County's requests, thereby extending to September 28, 1971, the final date for filing PASNY's direct case; extending to November 2, 1971, the final date for filing Intervenor's direct cases; and setting November 9, 1971, as the commencement date of the public hearing. The Notice stated that,

> * * * it is not necessary, desirable or in the public interest to delay the hearing indefinitely pending Commission action * * * .

On August 24, 1971, Greene County filed a Notice of Appeal to the Commission, claiming without elaboration that unless the Commission adopts the schedule which it proposed, the Commission

> * * * will be in violation of the Natural Environmental Policy Act, the guidelines promulgated thereunder and its own Order 415. It will also be unable to fulfill its responsibilities under Section 10(a) of the Federal Power Act.

On October 4, 1971, Durham filed a Notice of Appeal to the Commission to postpone the commencement date of the hearing to an unspecified date after determination of the motions to revoke the pumped storage project license and the appeal from denial of the motions for payment of counsel fees and expenses, claiming without elaboration that "it *is* decidedly in the public interest that the hearing be postponed until the Commission acts on the motions."

By Notice dated September 15, 1971, the Presiding Examiner extended the final date for filing Intervenors' direct cases from November 2, 1971, to a date 45 days from the date on which certain documents demanded by Durham in litigation against the Commission are produced pursuant to Court order, or a date 45 days from the date on which it is stipulated

that production has been made. The Examiner did not, however, extend the commencement date of the public hearing from November 9, 1971.

As with the preceding appeal, Durham and Greene County do not attempt to show that prompt decision by the Commission is necessary to prevent detriment to the public interest. Instead, they simply ask the Commission to reconsider that which the Presiding Examiner found to be not in the public interest. For the reasons given in connection with the preceding appeal, reconsideration of such procedural matter will be denied to the extent that it has not become moot by the Presiding Examiner's Notice dated September 15, 1971.

MOTION FOR A HEARING SITE IN GREENE COUNTY

By Notice dated September 2, 1971, Presiding Examiner Levy fixed the Federal Court House in Albany, New York, as the place for commencement of the hearing on November 9, 1971. On September 13, 1971, the Honorable Hamilton Fish, Jr., Representative for the 28th Congressional District and an Intervenor (Congressman Fish), filed a motion (1) to vacate such Notice and move the site of the hearing to Greene County or, alternatively, (2) to schedule an additional hearing date at a site in Greene County. Congressman Fish points out that the Presiding Examiner's Notice dated August 6, 1971, stresses that the public session is intended to afford local residents and organizations a more convenient opportunity to be heard, present their positions, and have their views considered; and he suggests that a site in Albany, where PASNY's offices are located, may be inconvenient for many Greene County residents and, therefore, not accomplish such purpose.

At the time of the pre-hearing conference on June 22, 1971, certain Intervenors suggested that the hearing be held in Greene County rather than in Washington, D.C., where most Commission proceedings are held; and it was arranged that such Intervenors, upon returning to the Greene County area, would ascertain the suitability and availability of accommodations (hearing room, meeting rooms, hotel rooms and stenographic services) and so inform the Presiding Examiner. While Congressman Fish suggests the use of certain facilities in Greene County, he does not indicate their availability other than the Greene County Court House, which will be available from December 13 through 17, 1971, and, consequently, necessitate delay of the hearing. The matter of scheduling the hearing is peculiarly within the competence of the Presiding Examiner, and we would not be justified in overruling him unless his determination as to the needs of the parties in the light of the status of the proceeding had been entirely unreasonable, which is clearly not the case here. On the contrary, his choice of Albany, New York, the closest sizable city to Greene County (and 13 to 51 miles from all parts thereof) appears to be reasonable and should not, therefore, be disturbed.

For the reasons given in connection with the preceding two appeals, consideration of such procedural matter will be denied.

The Commission orders:

(A) Durham's appeal from the denial of its motion, joined by Greene County, to presently award counsel fees and expenses payable either by the Commission or by PASNY, to provide copies of transcripts without charge, and for other appropriate relief, is denied as to counsel fees and expenses and denied without prejudice as to transcripts; provided,

that participants who desire copies of transcripts but, due to financial hardship, are unable to purchase the portions thereof pertinent to their interests, should file with the Commission affidavits, under oath, seeking leave to proceed *in forma pauperis* and demonstrating that they are unable to purchase transcripts.

(B) Durham's appeal from the denial of its motion that non-expert witnesses be permitted to testify in person in direct examination at the hearing without the necessity of the prior filing of prepared written testimony, is denied without prejudice.

(C) Greene County's and Durham's appeals from the Presiding Examiner's Notice dated August 6, 1971, granting PASNY's motion for an extension and denying their requests for indefinite extensions, are denied without prejudice to the extent that they have not become moot by the Presiding Examiner's Notice dated September 15, 1971.

(D) Congressman Fish's motion to vacate the Notice dated September 2, 1971, and move the site of the hearing to Greene County or, alternatively, to schedule an additional hearing date at a site in Greene County, is denied without prejudice.

By the Commission:

[SEAL.] KENNETH F. PLUMB,
Secretary.

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No. 71-1597

IN THE

Supreme Court of the United States

October Term 1971

FEDERAL POWER COMMISSION,

Petitioner,

v.

GREENE COUNTY PLANNING BOARD, ET AL,

Respondents.

AMICUS CURIAE BRIEF OF THE INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Independent Natural Gas Association of America (INGAA), having obtained the consent of all parties as required by this Court's Rule 42, submits this brief as amicus curiae in support of the Petition for Writ of Certiorari filed in the above cause by the Solicitor General.

THE AMICUS

INGAA is a non-profit association. Its members include most of the natural gas transmission companies subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. 15 U.S.C. §§ 717, *et seq.* Their operations account for more than 90% of the gas transported

and sold annually in interstate commerce in the United States. INGAA has participated as an intervenor or amicus curiae before this Court and various United States Courts of Appeal in matters arising out of Federal Power Commission decisions. It undertakes to participate in regulatory and judicial proceedings which are of substantial, industry-wide significance. The *Greene County* decision is such a case.

THE PROBLEM

The current shortage of natural gas is a matter of judicial notice. *Federal Power Commission* v. *Louisiana Power & Light Co.*, ... *U.S.* ....., 40 US L.W. 4636 (1972); *Public Service Commission for the State of New York* v. *Federal Power Commission*, No. 71-1161, D.C. Cir., decided March 29, 1972. FPC Order No. 448 issued January 24, 1972, 37 F.R. 2502. At least 26 cases are pending before the Federal Power Commission involving proposed pipeline curtailment plans. Seven pipeline companies are currently unable to meet their contractual commitments and are curtailing deliveries (See F.P.C. brief to this Court, page 17, *Federal Power Commission* v. *Louisiana Power & Light Company*, Nos. 71-1016 and 71-1040). Many natural gas transmission companies now have pending or contemplate the immediate filing of applications under § 7 of the Natural Gas Act of 1938, 15 U.S.C. §§ 717, *et seq.*, involving many millions of dollars and very substantial amounts of natural gas, LNG and SNG.[1]

In *Greene County*, the Court of Appeals has held that the regulations issued by the Commission under the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, relating to the issuance and circulation of environmental statements

[1] LNG refers to liquefied natural gas. SNG refers to synthetic or substitute natural gas.

do not meet the requirements of the National Environmental Policy Act of 1969 (NEPA). 42 U.S.C. §§ 4321, *et seq.* It has determined that *before a hearing can lawfully be held* the Federal Power Commission or its Staff must first issue its own, independently developed environmental statement and further that § 10(E) of the Guidelines issued by the Council on Environmental Quality (CEQ) permitting agencies to prepare draft statements on the basis of hearings held pursuant to the Administrative Procedure Act, 5 U.S.C.A. §§ 551, *et seq.*, does not correctly interpret the requirements of § 102(2)(C) of NEPA.

This decision affects pending, as well as immediately prospective, proceedings before the Federal Power Commission and other agencies. The Commission's regulations under the Natural Gas Act are in all significant respects identical to its regulations issued under the Federal Power Act which the court below held did not satisfy NEPA's requirements. *Cf.* 18 C.F.R. §§ 2.80, 2.81, 2.82. Unless reversed, *Greene County* will impair the Commission's ability to perform its other statutory duties with the consequent adverse effect on the natural gas transmission companies subject to its jurisdiction and on the public in general. This Court should issue the Writ and review the decision of the court below.

ARGUMENT

The lower court's decision is wrong. It represents an unreasonable, impractical construction of the procedural requirements contemplated by NEPA. It goes beyond that which is "practicable" and "possible". *Cf.* NEPA §§ 101(b), 102. It would extend the path a project must follow through the administrative review process into a virtually impassable procedural quagmire. It does all of this unnecessarily,

without regard to the practical consequences to the agencies involved and the public and without advancing, in any respect, NEPA's objectives of preserving or enhancing the environment.

NEPA Does Not Require Hearing Delays

The court below would require the Federal Power Commission to defer hearing on an application until its Staff had completed and circulated its own independently developed environmental statement. The Court plainly does not understand the nature and extent of such statements, the tremendous amount of work involved in their preparation and the number of applications involving major federal projects which the Commission is required to review annually. The Commission's Staff cannot physically perform the task which the court has imposed upon it.

The Federal Power Commission is not a constructing agency. It is a licensing agency. It is required to review applications on the basis of a hearing record developed under the requirements of the Administrative Procedure Act. It does not and cannot control the number of applications submitted for its review and analysis. It cannot be staffed to make the independent studies and investigations which the court would require in the preparation of a detailed environmental statement.[2] It does not have, nor could it reasonably be expected to have, nor need it have, the manpower and technical expertise to *originate* such state-

[2] The Commission's regulations place the initial burden of developing a statement on the applicant. The contents of such statements are prescribed, consistent with the requirements of NEPA and § 6 of the CEQ Guidelines. 18 C.F.R. § 2.80. The detail which the Second Circuit would require in any such statement is presaged by its comment that written testimony based on field research "cannot replace a single coherent and comprehensive environmental analysis . . ." 455 F.2d at 420.

ments. It *must* rely initially on the applicant and other interested parties, including those who oppose projects on environmental grounds.

Indeed the applicants themselves are not customarily staffed for the preparation of detailed environmental statements involving major projects. Such statements are ordinarily prepared by independent research associations such as Battelle Memorial Institute, Arthur D. Little, Inc. and various other public and private organizations acting in consultation with the applicant. Literally dozens of experts working in different technical areas and thousands of man hours may be involved in the preparation of a single environmental statement. For example, in a recent Federal Power Commission proceeding involving the construction of a naphtha gasification plant, the applicant's environmental statement was a compilation of the work of approximately 20 experts. Their total time equaled *more than two and one-third man years.*[3]

Furthermore, apart from the lack of manpower to cope with the sheer mass of workload which the court would inflict on the Staff, in many cases the Staff will have neither the expertise nor the information to prepare an environmental statement before hearing. For example, SNG projects involving the gasification of coal, crude oil, naphtha and other liquid hydrocarbons, which the Commission is considering, are completely dissimilar from projects involving pipelines, power lines and power plants. They involve new technology. They are the result of many thousands of hours and millions of dollars spent in research and development. The environmental statement associated with such projects will ordinarily involve data solely within the knowledge of the

[3] *Tecon Gasification Company, et al,* FPC Docket Nos. CP72-100, et al (Tr. 8:1431-32).

applicant. This will include the technical details of the plant, its layout and design, the processes to be employed, the discharge and handling of waste materials, alternative locations considered, as well as a description of the site and the projected effect on existing ecosystems. The information to be included in the statement must be developed not only from what is physically apparent in the area in which the facility is proposed to be located, it must also be developed from *what is proposed to be installed*. It is in this context that the distinction noted in the Solicitor's Petition between the initiating responsibility for environmental statements by "constructing" agencies and "licensing" agencies can be most clearly appreciated.

The hard fact is that the scope of the work and the time involved require that the statement be developed initially by the applicant and reviewed or otherwise tested in light of cross-examination and other evidence submitted in hearings before any responsible Federal official's report can be issued. *Cf.* NEPA § 102(2)(C). The practical consequences of the *Greene County* decision thus can only be extreme and crippling delay in the administrative consideration of major public projects or, alternatively, perfunctory attempts at technical compliance with the court's requirements. Neither is desirable. Neither is required by NEPA.

Two reasons are given by the court for delaying hearings until the Staff has prepared its "own" environmental statement. Neither is valid. The court states that the "danger" in accepting initially the applicant's statement is the "potential, if not likelihood" that the statement will be based upon "self-serving assumptions" 455 F.2d at 420. If, however, the applicant's statement is self-serving, incomplete, misleading, factually inaccurate or otherwise defective, this can be disclosed through cross-examination during the hearing or otherwise through Staff analysis.

The Commission is sufficiently sophisticated to discount "self-serving" statements. The court's reasoning is akin to a presumption of false swearing by an applicant.

The second and more fundamental basis for the court's conclusion is its view that the Federal Power Commission's Staff is the "responsible Federal official" referred to in § 102(2)(C) of NEPA whose statement together with the comments and views of other agencies is to accompany the proposal through the "agency review processes" and that the hearing must be considered a part of such processes. The court is wrong. Under the Administrative Procedure Act, the information gathering process is *not* concurrent with the "agency review process". Considerations of due process require the separation of the investigation and adjudication functions of federal agencies. *Cf.* Davis, Administrative Law Treatise § 13.02.[4]

NEPA does *not* provide that the agency's statement be a part of a hearing record. When read with the Administrative Procedure Act, it is clear that the "agency review processes" contemplated by NEPA can begin on the basis of a record made *after a hearing* in which all interested parties, including the Staff, have been given an opportunity to participate. This construction is completely consistent with NEPA objectives. It is consistent with the construction given NEPA in the CEQ Guidelines, to which the court referred and which provide for the preparation of the agency's statement *after* a hearing held subject to the APA

[4] In another context, the court below says that it should "defer to the Commission's discretion as to the proper information gathering techniques." See 455 F.2d at 423. The same is true with respect to the preparation of the environmental statement. Contrary to the court's view, the use of data developed during a hearing does not constitute a "delegation of responsibility" with respect to environmental conclusions any more than it does with respect to conclusions reached on the multitude of other issues which the agency is required to consider. See 455 F.2d at 420.

which is preceded by adequate public notice and information to identify the issues and to obtain comments provided for in the Guidelines. CEQ Guidelines § 10(E); 36 F.R. 7724 (April 23, 1971)[5]

NEPA is, as designated, a "Policy" declaration. It is basically intended to assure that the environmental effect of a project is given meaningful consideration in the decision-making process. Its policies and goals are recited by § 105 to be "supplementary to those set forth in existing authorizations of federal agencies". It is to be read with other federal acts. Congress did not intend through NEPA to destroy an agency's power to act effectively in the discharge of its other statutory responsibilities.

Staff Would be Given Effective Veto Power

This leads to the further practical problem associated with the *Greene County* decision. It vests too much control and power in the Staff. The court assumes that Staff is disinterested and totally objective, that it is the "responsible Federal official" referred to in NEPA whose statement is to accompany the proposal through the administrative review processes. The court grievously misunderstands the facts.

Staff is not disinterested. It usually assumes the role of an aggressive adversary. It frequently, indeed usually, acts in opposition to applications for authorization or other relief. It usually asserts to the Commission its own, independently derived position. It is the prosecutor, not the judge. *Cf.* 5 U.S.C. § 554. Its individual members frequently hold positive views with respect to particular projects or

[5] The contention that the Commission's regulations should be upheld because they complied with the CEQ Guidelines was dismissed by the court below as "superficially appealing". 455 F.2d. at 421.

proceedings which may or may not reflect Commission thinking.

Under *Greene County,* a segment of the Staff, by failing to prepare an environmental statement or simply by delaying the completion and filing of such a statement, could defeat a project which it opposed just as effectively (and perhaps more so) than it could by open opposition during a hearing. It is given virtual veto power. The applicant is left with no effective remedy available to it.

Clearly, the right to a hearing is denied by a rule which would create procedural error from an *adversary party's* refusal to prepare or its inadequate preparation. It may likewise be denied by imposing such extensive and burdensome conditions precedent to a hearing that an applicant's project may collapse before the agency review process can begin. It is submitted that this was not the intent of NEPA. It is, however, the effect of *Greene County.*

Review of NEPA by this Court is Required

Important issues are posed by *Greene County.* Maintaining a reasonable balance between environmental protection and the necessities and environmental amenities provided by adequate supplies of energy is a central problem *now.* The lower courts have tended to read severe procedural requirements into NEPA.[6] The effects of delay incident to their particular views with respect to the implementation of NEPA are dismissed with stoic resignation and with no apparent regard for practical considerations. Thus the court below states that "delay unfortunately is incident to our

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[6] *Cf. Natural Resources Defense Council, Inc.* v. *Morton,* 458 F.2d. 827 (D.C. Cir. 1972); *Calvert Cliffs' Coordination Committee, Inc.* v. *Atomic Energy Commission,* 449 F.2d 1109 (D.C. Cir. 1971).

mandate". Quoting the decision of the District of Columbia Court of Appeals in *Calvert Cliffs* it says:

> "Delay is a concomitant of the implementation of the procedures prescribed by NEPA, and the spectre of a power crisis 'must not be used to create a blackout of environmental consideration in the agency review process'". 455 F.2d at 422, 423.

Here, however, delay is clearly *not* a concomitant of the implementation of *NEPA's* procedures. It is a concomitant of the procedures which the *court* would require. The Commission's regulations, which the court held inadequate, could not by any reasonable construction be considered to impose a "blackout" of facts relating to the environmental consequences of projects under review. To the contrary, they provide the most complete, efficient technique for developing environmental information. The procedural requirement imposed by the court of a separate, independent Staff statement *before* hearing would add nothing more.

If the agency review process is not to come to a grinding halt, it is imperative that this court take jurisdiction, consider NEPA in the light of its declared goal of requiring a "practicable," reasonable consideration of environmental issues prior to agency action, and clarify for the federal agencies, the regulated utilities and other interested parties, the requirements which NEPA imposes. Impairing the Commission's ability to act can only further aggrevate the current gas supply shortage.

In the final analysis, it is not the agencies, nor indeed the regulated utilities which will be most affected by the additional cost and delay of attempts at compliance with *Greene County*. The public ultimately pays the cost. It suffers the inconvenience.

CONCLUSION

Greene County was incorrectly decided by the court below. Unless corrected, it can adversely affect pending and prospective projects before the Federal Power Commission and other federal agencies. The basic purpose of NEPA is not served by the court's decision. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1971

No. 71-1597

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v.

GREENE COUNTY PLANNING BOARD, *et al*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1597

FEDERAL POWER COMMISSION,

Petitioner,

v.

GREENE COUNTY PLANNING BOARD, *et al*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE CITY OF SEATTLE, WASHINGTON, AS *AMICUS CURIAE*

The City of Seattle, a municipal corporation of the State of Washington, hereby respectfully requests that the Court favorably consider the petition for a writ of certiorari filed by the Solicitor General.

Interest of the City as *Amicus Curiae*

The City of Seattle, through its Department of Lighting, has operated a municipal electric system since 1905, and presently is the second largest municipally owned electric system

in the United States. The great bulk of the City's power comes from hydroelectric developments owned and operated by it under Federal Power Commission license. These developments include the City's Skagit River Development initially licensed by the FPC in 1927 as FPC Project No. 553. The license for that project has been amended pursuant to FPC procedures some 16 times over the intervening 45 year period, most recently in 1967. Application for another amendment to the license to permit full development of Ross Dam, to provide the City and the Pacific Northwest with badly needed peaking power capability,[1] has been pending before the Federal Power Commission since having been filed by the City in December 1970.[2]

The City has engaged in extensive studies of the environmental consequences of the facilities covered by the pending application and filed an environmental impact statement as required by FPC's Order No. 415 implementing NEPA, with FPC and the Council on Environmental Quality which together with the application, has in turn

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[1] The FPC accurately predicted the perilous status of reserve peaking capacity under which the Pacific Northwest was forced to operate during the winter 1971-1972. FPC Memorandum: Chief, Bureau of Power to the Commission, "1971-1972 Winter Load-Power Supply Situation," p. 5 (Released Nov. 26, 1971).

[2] The proposed amendment seeks authority to construct the fourth and final stage of Ross Dam, which will raise the elevation of Ross Lake from 1602.5 to 1725. Ross Lake was formed when the first stage of the dam was built, and the fourth and final stage now under application was described in the initial filings in 1926. The existing structure incorporates facilities costing over $6,000,000 in contemplation of ultimate fourth stage construction.

been circulated by FPC over a year ago to some 16 other Federal and State agencies for comment. Public notice of the availability of this statement has appeared in the Federal Register. The City in the meantime has continued its environmental studies in order to be fully responsive to environmental concerns expressed by a number of conservation groups permitted to intervene in the FPC proceedings by Order issued by FPC in July of 1971. The hearing which must be held so that the City can evidence these studies through qualified experts, and can cross-examine any adverse testimony which may be offered under oath by intervenors in opposition – to the end that a Hearing Examiner and then FPC itself can reach some decision on a record – is now frustrated by the ruling below in *Greene County*. The consequent delay is a serious one in terms of the City's ability to handle its loads. As the petition of the Solicitor General indicates, the City's application is only one of 193 which are pending relating to the hydroelectric responsibilities of the Commission alone. The City believes the result below to be wrong but on any view of the merits, any protracted delay in the adjudicatory process is intolerable. The Court is accordingly urged to grant certiorari so that the important procedural question may be speedily resolved.

ARGUMENT

I

In *Scenic Hudson Preservation Conference v. F.P.C. (Scenic Hudson II)*, 453 F.2d 463 (2d Cir., 1971), *certiorari denied*, 40 L.W. 3598 (June 20, 1972), the Second Circuit upheld the Federal Power Commission's decision, finding that the Commission's procedures (which were less

demanding than those now in effect) complied with the specific directives contained in Section 102 of the National Environmental Policy Act (NEPA);[3] that the hearings reflected the "systematic, interdisciplinary approach" required by Section 102; and that the environmental statement required by Section 102(2)(C) of NEPA was submitted in the form of the Commission's opinion. The court concluded (at 481):

> . . . In view of the exhaustive environmental findings which occupy a substantial portion of the Commission's opinion, and the Commission's explicit conformance with the enumerated portions of the required statement, we conclude that full compliance with the National Environmental Policy (*sic*) has been demonstrated.

Despite this recognition and approval of the Commission's procedures, in an opinion issued only last October, the January opinion upon which the Government now seeks review would appear to have reversed *sub silentio* the approval of FPC procedures under NEPA clearly given in *Scenic Hudson II*. The opinion below makes frequent approving references to the Second Circuit's decision in *Scenic Hudson I*[4] (Pet. 3a-4a, 11a-12a, 13a, 14a, 20a), but only one passing reference to *Scenic Hudson II* (Pet. 24a).

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[3] 83 Stat. 853 (1970), 42 U.S.C. §4332.

[4] Scenic Hudson Preservation Conference v. Federal Power Commission [Scenic Hudson I], 354 F.2d 608, 614 (1965), cert. denied sub nom. Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

Regardless of the effect on *Scenic Hudson II*, the *Greene County* opinion has been strongly and we submit properly criticized as " . . . hair-splitting literalism in applying NEPA which is reminiscent of the technicalities of common-law pleading"[5]

NEPA was not intended to replace the Administrative Procedure Act, nor the procedures which have been developed pursuant to the APA in the daily business of agency adjudication. The statute itself refers to the "*existing* agency review processes" (Sec. 102(2)(c) at least implying that NEPA was not intended to change the decisional or review processes.

Furthermore, the statute's use of terms such as "practicable", "to the fullest extent possible", "appropriate", and "consistent with other essential considerations of national policy"[6] suggests agency discretion in the administration of the Act. This language does not command the inflexible procedural approach which the opinion below would impose.[7]

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[5] Roger C. Cramton, Chairman of the Administrative Conference of the United States, testifying at the recent hearings on NEPA [*Joint Hearings on the Operation of the National Environmental Policy Act of 1969 Before the Senate Comm. on Public Works and the Senate Comm. on Interior and Insular Affairs*, 92nd Cong., 2d Sess., at 418 (1972)].

[6] *See*, e.g. Sec. 101(b), Sec. 102.

[7] *See* Hearings supra n. 5 for Chairman Cramton's view that NEPA is not a "straitjacket" (at 393); that "a large degree of discretion ought to be accorded different agencies as to how they meet [the existing agency review processes] requirement" (at 393); and that " . . . too heroic a notion of what decisionmakers have to go through to make individual decisions, will cripple or impair the Federal decisionmaking process." (at 391).

II

The decision of the court below conflicts with Section 10(e) of the Guidelines of the Council on Environmental Quality (CEQ), 36 Fed. Reg. 7724 (April 23, 1971) which provide that no draft impact statement need be issued prior to a hearing in those instances ". . . where the agency prepares the draft statement on the basis of a hearing subject to the Administrative Procedure Act and preceded by adequate public notice and information to identify the issues and obtain the comments provided for in sections 6-9 of [the] guidelines". It is noteworthy that Section 7 of the Guidelines thus referred to also cites to the APA, noting that agencies "considering an action requiring an environmental statement" should consult with and obtain the comment of other Federal agencies having some jurisdiction or special expertise in the subject matter:

> . . . on the basis of (i) a draft environmental statement for which it takes responsibility or (ii) comparable information followed by a hearing subject to the provisions of the Administrative Procedure Act . . .

FPC has scrupulously followed these CEQ Guidelines in connection with Seattle's currently pending application with the important and critical exception that the holding of the APA hearing has been stalled as a consequence of the opinion below.

While it may be correct that these CEQ guidelines are "merely advisory", as the court below notes (455 F.2d 412, Pet. 16a), the Council's interpretation of NEPA should certainly be shown some deference,[8] especially

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[8] Udall v. Tallman, 380 U.S. 1, 16 (1965). See also Rosado v. Wyman, 397 U.S. 397, 415 (1970); United States v. Leslie Salt Co., (continued)

since CEQ has been entrusted by Section 204(3) of NEPA with the responsibility:

> (3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of the Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto.

In paragraph 12 of the Guidelines themselves CEQ stipulates that it will issue such supplements to its Gudelines as necessary "after examining environmental statements and agency procedures with respect to such statements . . . " We are aware of no supplements by CEQ with regard to FPC procedures let alone any recommendation by CEQ which would require the drastic alteration to the Commission's procedures which the opinion below would impose. Such a change, which would in effect require the Commission staff to take a position focused on the immediate environmental concerns of an application, without any reference to the need for the project involved, all prior to a presentation of the evidence, would appear to

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[8] (continued) 350 U.S. 383, 396 (1956). Citing the last case the court in Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, 744 (E.D.Ark., 1971), referring to CEQ's guidelines, stated that such administrative interpretation cannot be ignored except for the strongest reasons. *See* to the same effect Environmental Defense Fund v. T.V.A., 339 F. Supp. 806, 811 (E.D. Tenn., 1972), " . . . particularly where the interpretation is a construction of a statute by the men designated by the statute to put it into effect."

deny all parties involved, as well as the applicant, the procedural due process which the Administrative Procedure Act was enacted to achieve.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

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Respondents.

BRIEF OF RESPONDENT POWER AUTHORITY OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENT POWER AUTHORITY OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR FOR A WRIT OF CERTIORARI

This case involves a strictly procedural dispute between the Federal Power Commission (Commission) and some intervenors in a Commission proceeding who oppose constructon of a transmission line. Respondent, Power Authority of the State of New York (Authority) and consumers in New York State are unfortunately caught in the cross fire.

The Authority opposes the granting of the petition for a writ of certiorari on the grounds that:

1. A resolution of the issue which the petition asks this Court to resolve under "QUESTION PRESENTED" was not included in the judgment of the court below. By way of dictum the court expressed the opinion that prior to the start of hearings, which were in progress at the time of the court decision, on a transmission line with respect to which there is a contest, the Commission should have

circulated a draft environmental statement prepared by its staff with respect to the line.* However the court allowed the proceeding for approval of the line to continue, directing that a draft environmental statement be prepared and circulated and that intervenors be given an opportunity to cross-examine with respect to it prior to the Examiner's initial decision. Thus the dictum which is the subject of the "QUESTION PRESENTED" does not reflect the holding which was the foundation of the judgment. (Pet. App. pp. 10a, 18a.)**

2. The case should be considered moot because the Commission largely complied with the judgment of the court below before countermanding an order it had given its staff to comply. (The recission order was made after the Solicitor General agreed to petition for a writ of certiorari.)

3. This case is not a proper vehicle for this Court's resolution of the several complicated questions which are currently being considered throughout the United States with respect to interpretation of the National Environmental Policy Act (NEPA) (42 U. S. C. § 4321 *et seq.*) since: (a) this case at most involves only one of such questions and a narrow one at that; (b) other pending cases involve additional questions as well; (c) the Commission's compliance with the order of the court below would require virtually no additional functions to be performed by its staff except circulation of a draft statement which has already been prepared or virtually prepared and thus

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* The Court also expressed the opinion that a draft environmental statement should have been prepared and circulated by the Commission prior to its making a determination with respect to two transmission lines concerning which there was no contest and no hearing. It denied the relief sought with respect to those lines.

** References to the Solicitor General's Appendix are to "Pet. App." References to the Authority's Appendix annexed hereto are to "A. App."

would impose no burden on the Commission; (d) granting the petition would inevitably result in extremely serious delay in the availability of transmission facilities urgently needed to carry electric power, particularly to the New York City area, and hence would be very much against the public interest whereas review will undoubtedly be sought in other cases where similar consequences would not result; and (e) the merits of the case before the Commission are not involved.

Events in the Proceeding

On August 15, 1968 the Authority applied to the Commission for a license to build a one million kilowatt pumped storage hydroelectric project in the Catskill Mountains southwest of Albany. (The project is known as the Blenheim-Gilboa Project.)

On June 6, 1969 the Commission issued a license for the plant and *three transmission lines* connected with the project switchyard but required that construction of the lines be deferred until the Commission specifically approved plans for design and location including "plans for preservation and enhancement of the environment as it may be affected by the transmission lines[']] design and location".

On June 16, 1969 the Authority accepted the license, immediately started construction and proceeded to borrow in stages approximately $200,000,000 to pay the cost.

On November 24, 1969 the Authority filed for approval plans for the three transmission lines together with an Appendix describing environmental considerations.

On January 1, 1970 the President signed NEPA and it became effective on that date. (It had been passed by both Houses of Congress in December, 1969.)

On April 10, 1970 the Commission after study by its staff approved plans for two of the lines, there being no opposition to them.

There being opposition to the third line, largely by residents of Durham, one of the towns in Greene County through which it would pass on its way to Leeds near the Hudson River south of Albany, the Commission deferred action with respect to it and granted petitions for intervention by respondents herein (other than the Authority) and several landowners in the Durham area.

On December 4, 1970 the Authority filed an amended application for approval of the Leeds line containing a modification of the route first proposed and also an alternate route avoiding most of Durham but traversing a good part of the Town of Greenville in Greene County.

Also on December 4, 1970 the Commission issued its Order No. 415 for the first time establishing regulations implementing NEPA. (36 F. R. 18958, 18 C. F. R. §§ 2.80-2.82.)

On March 15, 1971 the Town of Greenville which objected to removal of the proposed line location from Durham into its territory filed objections to the alternate route and moved to intervene. (Intervention was granted on May 4, 1971.)

On March 26, 1971 the Authority filed its Environmental Statement with respect to the Leeds line in compliance with the Commission's Order No. 415. The Authority circulated the Statement as required by Commission regulations and gave it additional circulation and publicity beyond that required by the regulations. In the Environmental Statement the Authority described three additional alternate routes for the line which were advanced by people objecting to the two alternates set forth in the Authority's amended application for approval. The Statement made clear that the Authority did not consider any of the three added alternates feasible.

The Commission staff reviewed the Authority's Environmental Statement as to form, found it not to be deficient, circulated it among federal and state agencies,

sought their advice with respect to it and made it public as required by Commission regulations. (The court below held the consultation requirements of NEPA were thereby met. Pet. App. pp. 17a-18a.)

On June 22, 1971, following a Commission order directing that hearings be held, a Commission Examiner conducted a pre-hearing conference and set up a procedural schedule for filing and serving prepared written testimony by the Authority, the staff and the intervenors and for the actual holding of hearings.

In November and December, 1971 and January, 1972 hearings were held but not completed.

In the meantime on October 22, 1971 some of the intervenors petitioned the United States Court of Appeals for the Second Circuit for review of the Commission's assumed denial by silence of many motions made by the intervenors including motions to stop construction of the project proper and the two transmission lines, construction of all of which was then about 80% complete, and a motion to stay the proceeding on the Leeds line pending the Commission's distributing a draft environmental statement which intervenors contended should have been done before the hearings started.* The court denied a motion to stay the proceeding and on January 17, 1972 entered the

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* On November 19, 1971 while the court proceeding was pending the Commission issued its Order No. 415-B amending Regulation §2.81(b) to provide that the applicant's draft statement after being approved as to form by the staff and after being modified if found to be deficient in form "shall be deemed to be information comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental Quality". (Pet. App. pp. 33a, 44a.)

Before argument in the court below Authority Counsel pointed out to Commission Counsel the urgent need for the Leeds line and the importance of keeping the proceeding before the Examiner going. Authority Counsel requested that the Commission file and distribute a draft environmental statement and thus avoid a court decision.

(Footnote continued on next page)

judgment here sought to be reviewed. The only relief granted by the judgment was a direction to the Commission to have its staff, prior to the Examiner's initial decision, prepare and circulate a draft environmental statement and obtain comments on it and that the Examiner allow the intervenors to examine Authority and staff witnesses with respect to it before the hearings are closed. (Pet. App. p. 18a.) (The court expressed the opinion that NEPA requires that a draft statement be circulated before hearings in all cases except where there are two hearing the first "*solely* to gather information to aid the Commission in formulating its statements, the

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(Footnote continued from preceding page)

After the Court of Appeals' decision Commission Counsel made it clear to Authority Counsel that in cases other than the instant case the Commission would go ahead with administrative proceedings upon applications under the Federal Power Act and the Natural Gas Act where significant environmental considerations are involved without complying with what the opinion of the court below said the law to be. The fact that it is doing so is illustrated by a gas certificate case involving a $139 million gasification plant and related pipeline facilities for which application to the Commission was filed in October 1971 and in which hearings were ordered by the Commission on February 24, 1972 five weeks after the Court of Appeals' decision in the instant case without requiring staff to file a draft environmental statement. The hearing was completed May 24, 1972. The staff did not file a draft statement before, during or after the hearing. *Tecon Gasification Co. et al.*, FPC Docket Nos. CP72-100, *et al.* (See also *Utah Power and Light Co.*, Project No. 1744; *Arkansas Louisiana Gas Co.*, Docket No. CP70-267, Opinion No. 612, issued February 18, 1972; *Distrigas Corporation*, Docket Nos. CP70-196, *et al.*, Opinion No. 613, issued March 9, 1972; *El Paso Natural Gas Company*, Docket No. RP72-6, Order issued March 6, 1972; *United Gas Pipeline Co.*, Docket Nos. RP71-29, *et al.*, Opinion No. 606, issued December 3, 1971, Presiding Examiner's Order issued February 17, 1972, and Order issued March 31, 1972, staying Presiding Examiner's ruling; and *Florida Gas Transmission Company*, Docket No. CP70-104, Order issued February 17, 1972.) See, however *Columbia LNG Corporation, et al. (infra pp. 17-19)* where the Commission staff circulated its own draft statement in a brief to the Examiner at the close of hearings and asked for reopening of hearings to consider matters reflected in it.

second to consider the merits of the license application" (Pet. App. p. 16a, emphasis added). This statement of the court was not necessary to the judgment.)

The court again refused to stop the proceeding before the Examiner pending circulation of, and receiving comments on, a draft environmental statement and left it to the Commission to determine the most efficient procedure for meeting the court's mandate. (Pet. App. p. 18a.)

Basically what the court did in its judgment was to hold that before the close of hearings on an application to a federal agency for a license or other approval in a situation significantly affecting the environment, the agency through its staff must prepare, circulate and receive comments on an agency draft environmental statement and the Examiner must give intervenors an opportunity to utilize that statement in the course of hearings. In doing so the court held invalid the provision in Section 2.81(b) of the Commission's regulations that an applicant's draft environmental statement as modified by applicant if required by initial review by the staff as to form is "information comparable to an agency draft statement". The court held that an agency's circulation of an applicant's statement after any required modification as to form does not satisfy the requirement that the agency's staff circulate and receive comments on a draft statement of its own composition. (Pet. App. pp. 9a-18a.)

On January 28, 1972, the Commission Examiner held a formal conference to discuss the judgment of the court and to establish procedures for going ahead. Intervenors refused to attend but sent the Examiner a letter stating their position. At the conference Commission Staff Counsel stated that the staff would prepare and file a draft environmental statement and asked a specific time in which to do so. Staff Counsel also asked that the Authority furnish the staff with a great deal of information which they listed on the record including prognoses as to the need for

power in New York State in the 1970's and 1980's and plans of the Authority and other power entities for providing generating and transmission facilities to supply such needs. Covered by the request was the report of the results of a feasibility study of proposed additional generation facilities on the Schoharie Creek which the Authority had announced was being made at the prehearing conference the preceding June and which it then had agreed to make available to all parties and the public during the hearings as soon as completed. (The report was nearly complete at the time of the January 28 request and was filed shortly thereafter.) In addition Staff Counsel asked that the intervenors be required to file prepared testimony which they had been directed to file and had agreed to file by January 18, and had prepared but had not filed. Staff Counsel stated that all this material was needed for the preparation of the draft statement.

The Examiner made an order setting a time for circulation of a draft statement and refused to delay the resumption of hearings as requested by intervenors in their letter until the draft statement had been circulated for 45 days.* The Examiner stated however that intervenors could move to fix time and place of hearings to conform with their convenience.

After the Examiner at the intervenors' request certified procedural questions to the Commission, the Commission on March 7, 1972 issued an order affirming the Examiner's direction that the staff file and circulate a draft environmental statement by the time prescribed but modified his procedural schedule by providing that hearings resume after the statement had been distributed for 45 days and comments received from interested agencies rather than while it was being prepared and distributed. (A. App. pp. 1a, 15a.)

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* Section 2.81(b) of the Commission's regulations provides that agencies to which an environmental statement is circulated shall be afforded 45 days in which to respond.

In its March 7 order the Commission directed:

> "(C) The Examiner shall reopen the record to receive, as soon as practicable after the completion of such circulation period, additional direct testimony from PASNY and the Commission staff, and to allow additional cross-examination promptly thereafter; and he shall open the record to receive, as soon as practicable after the completion of such cross-examination, direct testimony from Intervenors, and to allow cross-examination promptly thereafter." (A. App. p. 5a.)*

In its March 7 order the Commission said that it was seeking a rehearing of the Court of Appeals' judgment but that

> "* * * the public interest requires that this proceeding progress rather than remain dormant pending judicial review * * *." (A. App. p. 4a.)

The Court of Appeals denied the Commission's petition for rehearing on March 10, 1972. (Pet. App. pp. 31a-32a.) The Commission asked the court to stay its mandate but the court refused on April 5, 1972.

On February 28, 1972 the Court of Appeals granted a motion by the Authority to clarify its opinion by correcting minor errors and by amending a statement in the opinion about the Authority which had been taken from the brief of petitioner Greene County Planning Board. (The corrections and amendment are not reflected in the opinion as printed in Appendix A to the petition for a writ of certiorari. The court's order is printed in the annexed appendix at p. 18a.)

The intervenors filed and served some written testimony, they had already prepared, as directed by the Examiner and the Authority filed and served a great mass of material requested by the Commission's staff. The last day upon which the staff could possibly have filed a draft environmental

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* The record was never closed.

statement in timely compliance with the March 7, 1972 order of the Commission was May 15, 1972.*

On June 1, 1972 the Commission unilaterally and without notice to any of the parties other than its staff issued an order countermanding its March 7 direction to the staff to prepare and circulate an environmental statement. The order also stayed the administrative proceeding before the Examiner. The stated reason for the order was that the Solicitor General had agreed to apply for a writ of certiorari and there was concern that if the staff were not forbidden to circulate the draft statement the case might become moot and further concern that continuance of the proceeding absent obedience to the Court of Appeals' judgment directing circulation of the draft statement might conflict with that court's mandate. (A. App. pp. 6a-8a.)

In efforts to persuade the Commission to rescind or modify its June 1 order so that the proceedings could continue the Authority took many steps including: a telegraphed request by the then Acting Chairman of the Authority for rescission which the Commission treated as a motion for reconsideration; a motion to the Court of Appeals for clarification of its judgment to make clear whether or not it would consider continuance of the proceedings absent the Commission's compliance with the court's direction with respect to the draft environmental statement a violation of the mandate; an application to this Court which was referred first to Mr. Justice Marshall and later to Mr. Justice Rehnquist for a full or partial stay of the Court of Appeals' judgment to the end that proceedings continue pending decision on the petition for a writ of certiorari; and a formal application for rehearing by the Commission of its June 1 order.

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* The draft statement was required to be filed within 45 days after receipt by the Commission staff of material requested *on the record* at the January 28 conference from Authority and intervenors. The staff requested further material *informally* from the Authority, the last of which the Authority submitted on March 29, 1972, 45 days before May 15.

The telegraphed request which was treated by the Commission as a motion for reconsideration was denied July 5, 1972. (A. App. p. 9a.) The motion to the Court of Appeals for clarification was denied June 14, 1972. The application to this Court for a full or partial stay was denied by Mr. Justice Rehnquist on July 27, 1972. The application to the Commission for rehearing was denied on August 1, 1972. (A. App. p. 12a.)

Jurisdiction of the Commission

Section 4(e) of the Federal Power Act (16 U. S. C. §797(e)) authorizes the Commission to issue licenses for project works "necessary or convenient" for power developments on waterways over which Congress has jurisdiction. Section 3(11) in defining "project" includes "primary line or lines transmitting power therefrom [the project] to the point of junction with the distribution system or with the interconnected primary transmission system". (16 U.S.C. § 796(11)). The Leeds line does not connect with a distribution system. Neither does either of the other two lines included in the project. The other two lines are already part of the State's interconnected primary transmission system. If the Leeds line is completed it will be also. It will be a very important part of it.

The Commission licensed the three lines as primary lines but in the Leeds proceeding the matter with respect to that line has been reopened.

Some intervenors took the position that the Leeds line if constructed will not be a primary line but will be part of the interconnected grid. At the initial hearing in Albany the Examiner refused to require the intervenors unequivocally to state on the record at that time whether or not such was their position.* In contesting the need for

* The discussion before the Examiner appears at pp. 178-181 of the transcript of the hearing in the proceeding held on November 9, 1971 at Albany, N. Y.

the line at the hearings intervenors restricted their cross-examination to the need for the line to carry project power and to insure stability of the power plant. Thus they confined their treatment of need to need as a primary line.

If the line were held not to be a primary line the Commission would not have jurisdiction and the line could legally be built by the Authority under state law (New York Public Authorities Law, § 1005). Thus, whether or not it is a primary line is a threshold issue in the Commission proceeding. A resolution of the issue has been put off by the Commission's June 1, 1972 order staying the proceeding "pending final review by the United States Supreme Court of the Court of Appeals decision * * *." (A. App. p. 8a.)

Status of Commission Proceeding

Many issues have been raised in the Leeds line proceeding, some by the intervenors' cross-examination of witnesses presented by the Authority and the Commission staff, some in direct testimony of Commission staff witnesses, some in New York State Public Service Commission comments on the Authority's Environmental Statement and some as a result of events which have occurred since the amended application for approval of the line was filed in December, 1970. Included among the latter are changes in route which the Authority has suggested and which resulted from recent developments in the area involved such as subdividing and the building of structures.

While the original application sought approval of a single circuit 345 kv line, the Commission because of the prospect of additional generating facilities being constructed in the area and elsewhere must consider whether the towers should be capable of carrying two 345 kv circuits as suggested by the State Public Service Commission and whether they should be capable of being converted to 765 kv as suggested by a Federal Power Commission

expert witness. Both suggestions were made in anticipation of further transmission capacity being needed in the future because of construction of additional generating facilities by the Authority and other power entities. Testimony showed that additional facilities will be necessary as part of the interconnected grid whether more generating facilities are constructed on the Schoharie or not.

The Commission must consider the additional issues, not only because of NEPA but also because of the requirements of Section 10(a) of the Federal Power Act which provides:

> "(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interestate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes * * *." (16 U. S. C. § 803(a); see *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (2d Cir. 1965), *cert. denied sub nom., Consolidated Edison Co. of New York* v. *Scenic Hudson Preservation Conference*, 384 U. S. 941 (1966); *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 453 F. 2d 463 (2d Cir. 1971), *cert. denied*, 32 L. Ed. 2d 813 (1972).)

Long before the hearings commenced, the locations of the alternate routes of the line for which approval had been sought as well as information with respect to voltage and design of structures shown in the application for approval were advertised in newspapers and given wide circulation. Notice was given as to where and when the application, plans and drawings including sketches of alternate types of structures could be examined.

Some of the additional issues, further consideration of which must be given in the proceedings, are so substantial

that additional advertising and other forms of notice must be carried out in order to comply with the Federal Power Act, the Commission's regulations thereunder and related statutes.

A great amount of prepared testimony and exhibts must be submitted by the Authority and by others who wish to do so.

For example, intervenors cross-examined Authority and staff witnesses at length on the issue of undergrounding but have submitted no affirmative testimony on the issue and no exhibits. Likewise they cross-examined at length on the need for the line as a primary line and did some cross-examination on route selection but have submitted no testimony of their own on either and no exhibits except an essay on the history of the Susquehanna Turnpike concerning which some of the prepared testimony they submitted relates.

The Authority, as required by the Commission, submitted exhibits showing precise locations and elevations of tower sites on the two alternate line routes one or the other of which the Commission has been asked to approve. It must submit similar exhibits with respect to suggested revised route locations not only for single circuit 345 kv towers but for higher towers capable of carrying two 345 kv circuits and for still higher towers capable of carrying two 345 kv circuits and being converted to a single 765 kv circuit. It also must present exhibits showing locations of the higher towers on the routes already subject to the hearings. The Authority will of course also have to submit direct testimony explaining the exhibits. Higher towers require a wider right-of-way and the effect of widening must be shown.

The Authority intends to produce additional evidence on the need of the Leeds line to carry power to the New York City area and on the need of the line to insure stability of the power plant and of power systems to which the power will be delivered when one of the other lines from the plant

is out of service because of faults or maintenance requirements.

The Authority will be prepared to supply the additional material soon after an order is given for the proceeding to be resumed. However, everything has been stayed by the Commission's June 1 order. (A. App. p. 6a.)

Status of Project Construction

The project proper consisting of a lower reservoir in Schoharie Creek with a dam designed to handle 155,000 cubic feet of water per second, an upper reservior 1,000 feet higher, a powerhouse, penstocks, motor generators, pump turbines, dikes, roads, and other features is 92% complete. The transmission lines to Fraser (Delhi) and to New Scotland (Albany) are complete. They were energized on July 27, 1972 and are being used to bring power from the west, largely Pennsylvania, to the Albany area.

Other Pending Cases Involving Interpretation of NEPA

On May 22, 1972 this Court granted a writ of certiorari to the Court of Appeals for the Tenth Circuit in *Upper Pecos Association* v. *Stans*, 452 F. 2d 1233 (1971), 40 L. W. 3556. The case involves a two to one decision affirming a judgment of the District Court for the District of New Mexico on a challenge to the legality of a grant made by the Economic Development Administration of the Department of Commerce (EDA) to a county in New Mexico of 80% of the cost of building a road in the Elk Mountain area. A declaratory judgment was sought to the effect that the grant was invalid because of violation of NEPA (328 F. Supp. 332). EDA issued no environmental statement before or after making a decision to make the grant of money but the Forest Service which was charged with approving the location of the road and which the court found to be the "lead agency" did circulate an environmental impact statement after the decision on the grant had

been made by EDA. The opinion of the majority of the Court of Appeals said that there was presented a question of the point in time at which an environmental statement must be available. The majority of the court held that the circulation of the environmental statement after the EDA decision on the grant was timely. The dissenting judge took the position that NEPA required that EDA consider the environmental consequences of making the grant and that it had failed to comply with NEPA. (452 F. 2d at 1234-37.)

In the instant case this Court is asked for an advisory opinion. The subject of the requested opinion is actually in issue in the *Upper Pecos* case. This Court can, therefore, answer the "QUESTION PRESENTED" in the instant case in the *Upper Pecos* case which is already before the Court. It can do so without the unfortunate delay to an important public project which will come about if a writ is granted in the instant case.

Kalur v. *Resor*, 335 F. Supp. 1 (D. D. C. 1971), is an action for a declaratory judgment and injunction. The court set aside regulations promulgated by the Secretary of the Army under NEPA and Section 13 of the Rivers and Harbors Act of 1899 (33 U. S. C. §407). The regulations were concerned with applications for permits to make discharges into navigable streams or non-navigable tributaries. The court held, contrary to the contentions of the Government, that NEPA applies to all applications for permits to discharge material into navigable streams including those where water quality is involved and held invalid Corps' regulations exempting the Corps from issuing environmental statements in permit cases where water quality is solely involved.* The case is on review before the Court of

* It also held that Section 13 of the Rivers and Harbors Act forbids discharges into non-navigable tributaries of navigable streams and that the Corps of Engineers does not have authority to permit such discharges although it does have such power as to navigable streams.

Appeals for the District of Columbia Circuit and is expected to be argued early in the fall. It involves issues in addition to the narrow issue sought to be presented in the instant case and is deemed to be of great importance by the Department of the Army. A writ of certiorari will almost inevitably be requested. The proceeding is a general attack on regulations under which no action was ever taken. No specific project is involved so the question here sought to be resolved along with other NEPA questions could be resolved by this Court in that case without delaying a vital public project.

For other cases involving preparation and circulation of agency environmental impact statements, the scope of review under NEPA and the question of what constitutes major federal actions subject to NEPA see *Sierra Club* v. *Sargent,* Civil No. 249-71C2, (W. D. Wash. March 16, 1972); *Students Challenging Regulatory Agency Procedures* v. *United States,* No. 971-72, (D. D. C. July 10, 1972) involving an Interstate Commerce Commission freight rate decision; *Citizens for Clean Air* v. *Froehlke,* No. 72 Civ. 2259, (S. D. N. Y. August 1, 1972). See also *Sierra Club* v. *Hardin,* 325 F. Supp. 99 (D. Alaska, 1971). That case which involves the need, adequacy and timeliness of an environmental statement is scheduled to be argued in the Court of Appeals for the Ninth Circuit on September 7, 1972.

The Commission staff did largely what the court below directed be done in the instant case, in *Columbia LNG Corporation, et al.* (F.P.C. Docket No. CP71-289 *et al.*) The case involves an application for approval of a liquid natural gas facility on Chesapeake Bay in the area of Calvert Cliffs Park which was described in *Calvert Cliff's Coordinating Committee, Inc.* v. *Atomic Energy Commission,* 449 F. 2d 1109 (D. C. Cir. 1971). Approval was sought for various project features including a pier extending 6,000 feet from the shore of Cove Point to accommodate tremendous tankers. The application was filed on June 4, 1971. Hear-

ings before an Examiner were completed on July 8, 1971. The Commission staff filed a brief with the Examiner on August 16, 1971. Attached was an appendix labeled "Draft Environmental Statement". The statement was circulated for 45 days. On August 18, 1971 the staff made a motion requesting that state and federal agencies be allowed until September 30, 1971 to file comments in connection with the staff draft environmental statement.

Thereafter and before the Examiner handed down a decision the Commission staff joined in a successful application to reopen the hearings and urged that witnesses on environment previously examined be subject to cross-examination. Additional hearings were held and environmental testimony received. The hearings were concluded on January 24, 1972, seven days after the decision of the court below in the instant case. On February 29, 1972, the staff filed a brief attached to which was an appendix modifying and updating its draft environmental statement based upon evidence at the second hearing . This was one month and 12 days after the decision of the Court of Appeals in the instant case. On May 15, 1972 the Commission issued an order expediting proceedings and cutting down on the time prescribed in the regulations for the parties to file exceptions to the Examiner's decision. His decision was filed on May 22 and included a draft "Environmental Statement". On June 28, 1972, thirty-seven days after the Examiner's decision the Commission adopted his decision with some modifications. The Commission decision contained a final environmental statement.

The action of the Commission Staff in the *Columbia* case did not conform to the judgment of the court below in that its draft statement was not filed prior to the close of the hearings before the Examiner. However, it cured the lack of conformance by circulating the statement and joining in the successful application to the Examiner to reopen the hearings in which environmental evidence was received.

On motion of parties including the Sierra Club and the Maryland Conservation Council, the Commission issued an order granting rehearing. The grounds upon which rehearing was sought included allegations of violation of the Commission's own environmental regulations with respect to notice and violation of NEPA including alleged violations of requirements with respect to the draft environmental statement.

Court review will undoubtedly be sought in the case which involves many issues and a writ of certiorari will almost certainly be asked.

Many other cases involving NEPA are pending throughout the country.

The Urgent Need for the Line

The line as planned is only about 33 miles long and if built without further extensive delay will replace only four or five houses. It is of vital importance to carry power to the New York City area and to insure the stability of the project power plant and of at least one power system to which power will be directly delivered. It is needed both as a project primary line and as a necessary link in the interconnected grid. It is by far the most important of the three project lines. Although need for the line is one of the issues raised by intervenors all evidence presented has shown the need and none has shown a lack of need. More evidence based on additional recently completed computer tests will be presented when the hearing resumes.

Leeds is on the way to New York City from the Blenheim-Gilboa Project. To increase substantially the amount of power which can be carried from the project and the west to New York the Leeds line must be completed and the capacity of some connections between Leeds and New York increased. This increase in capacity is being delayed pending decision on whether or not the Leeds line in fact

will be built because the power entities involved need to have assurance that it will be built before commiting the necessary funds.

When the Leeds line is built and the capacity of those connections increased and a 345 kv interconnection from Fraser south (the missing links in which have recently been approved by the State Public Service Commission) is built the amount of power which can be carried from upstate New York to New York City will be increased by an amount almost equal to the amount which can be carried to New York now over existing facilities.* The Leeds line is essential to this result.

While the City's peak loads are in the summer, upstate's peak loads are in the winter. Thus, the Blenheim-Gilboa plant will be of the most value upstate in the winter and in the City in the summer.

The power situation in New York City and Westchester County in the summer is desperate and getting worse. The 1,000,000 kilowatt Blenheim-Gilboa plant represents almost one-eighth of the peak power load which New York City experiences in the hot summer months. The Leeds line is essential for carrying power to the New York City area.**

Because of delay already experienced it is not now possible to have the Leeds line and the improved interconnections on the east side of the Hudson ready for service to

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* There are two 345 kv lines between Albany and Leeds. When the Authority's Leeds line is complete it together with its New Scotland line will constitute a third 345 kv line to Leeds.

** Leeds is a key point. A very important new switchyard is located there. Two 345 kv lines and some lower voltage lines from it go across the Hudson and down the east side to New York City. Additional 345 kv lines will be substituted for the lower voltage lines. It is this work which is being impeded by delay in the Leeds line. Recently a 345 kv line was completed from Leeds on the west side of the river south to Roseton about half way to New York City. A 345 kv interconnection is planned from Roseton south for future construction.

New York for the summer of 1973. It is important that further delay be avoided in order to have them ready for the summer of 1974.

The Authority's Position With Respect to the Opinion Below

The Authority sympathizes with the problems of the Commission and other agencies in carrying out traditional duties and in addition the many added duties imposed by NEPA. The Authority is in the position of other public and private organizations which have an obligation to supply goods or services vitally needed by the public. It believes that there must be an accommodation between environmental considerations which are of course extremely important and the needs of human beings for the essentials of life such as electricity. It recognizes that ultimately this Court must resolve differences between extreme positions taken by some as to interpretation of statutes designed to safeguard the environment and the positions of entities charged with the responsibility to construct needed facilities which have an effect on the environment.

We believe that the opinion of the court below to the effect that agency draft environmental statements must be submitted prior to the start of administrative hearings in all cases except where an administrative hearing is conducted "*solely*" for the purpose of obtaining information on which to base the statement is unsound. There is no statutory or practical basis for it. An agency staff can formulate a much more useful and adequate statement after a hearing is commenced and issues joined than before.

However we believe that the actual judgment of the court below requiring a staff draft statement prior to the close of the hearing is reasonable and legally justifiable. It is consistent with the position the Authority took in the court below. (Pet. App. p. 10a.)

Conclusion

It was not necessary for the court below to answer the "QUESTION PRESENTED" in order to reach its judgment. The opinion expressed by the court that an agency draft environmental statement must be circulated prior to commencement of administrative hearings is dictum. The judgment of the court was that such an impact statement must be circulated *before hearings are closed* and must be made a subject of the hearings if requested by intervenors. Hence, there is not presented to this Court a controverted issue necessarily passed upon and since the judgment does not match the "QUESTION PRESENTED" it is not properly reviewable.

The Commission substantially complied with the mandate of the court below by having its staff either complete or almost complete a draft environmental statement after receiving from the Authority a mass of technical information and computations which it prepared at great expense and in good faith on the basis of the staff's formal statement in the course of Commission proceedings that it was necessary for the preparation of a draft statement which the staff stated it would circulate and which the Commission later formally ordered it to prepare and circulate. Under these circumstances the Commission's abrupt change of course did not keep the case from being moot.

Other cases now in litigation, one of which is already before this Court and several of which will almost surely be brought to the door of this Court, involve the question here sought to be resolved as well as other questions with respect to interpretation of NEPA. The case in which a writ of certiorari has already been granted or one of the others now in litigation would form a much better vehicle for this Court's interpretation of NEPA than the instant case.

Requiring the Commission to comply with the judgment of the court below by denying the petition would require no substantial work on the part of its staff or place any

burden on the Commission because of the extent to which the judgment has already been obeyed. On the other hand the Authority would be put to great hardship and expense by the granting of the petition and power consumers would be put at a great disadvantage because of the delay in the construction of essential power facilities.

For these reasons the petition for a writ of certiorari should be denied.

However, it is respectfully requested that in the event the petition is granted the Court direct that the proceedings before the Commission be resumed and carried forward during pendency of the case in this Court. This would be highly proper because (i) the court below held that the Commission had carried on adequate consultation with other agencies by circulation of the Authority's Environmental Statement, (ii) all issues which could conceivably be raised in the proceeding before the Commission have already been raised so the availability of a staff environmental statement is not essential for notice purposes, (iii) the merits of the case before the Commission are in no way involved, and (iv) regardless of what decision this Court might finally make on the merits a Commission environmental statement could be circulated before the hearings are finally closed and made available as provided in the order of the court below.

Respectfully submitted,

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August 8, 1972.

APPENDIX

FPC Order of March 7, 1972

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

POWER AUTHORITY OF THE STATE OF NEW YORK } Project No. 2685

ORDER ADOPTING PROCEDURE FOR HEARING

(Issued March 7, 1972)

On June 6, 1969, the Commission granted a license to the Power Authority of the State of New York (PASNY) to construct and operate the Blenheim-Gilboa Pumped Storage Project No. 2685 including, as part of the project works, three 345 Kv transmission lines (41 FPC 712). The principal project works and two of the lines are currently nearing completion. This proceeding involves PASNY's application to construct the third line, which it proposes to route from the Town of Gilboa, in Schoharie County, New York, to the Leeds substation in the Town of Athens, in Greene County, New York.

As of the conclusion of the cross-examination of PASNY's and the Commission staff's direct witnesses on January 7, 1972, the schedule for the hearing provided that Intervenors would file the prepared testimony of their direct witnesses on or before January 18, 1972, and that cross-examination of such witnesses would commence on February 15, 1972. On January 17, 1972, however, the United States Court of Appeals for the Second Circuit issued an opinion[1] holding that the Commission staff is required by

[1] *Greene County Planning Board* v. *Federal Power Commission*, Docket Nos. 71-1991 and 71-1996.

the National Environmental Policy Act of 1969 (NEPA) to prepare and circulate a draft environmental impact statement and should have done so prior to the hearing.

Intervenors did not file the prepared testimony of their direct witnesses when due and, by Notice issued January 21, 1972, Presiding Examiner William C. Levy called a conference for January 28, 1972, "for the purpose of considering the impact of the Court of Appeal's [sic.] opinion on the future course of this proceeding and adopting such procedures and schedules as may be required by the courts [sic.] opinion and remand."

The Commission staff indicated at the conference that it would prepare and circulate an environmental impact statement solely for the purpose of expediting the proceeding and not as an interpretation of the Court of Appeals' opinion. The staff requested that the environmental information accumulated by both PASNY and Intervenors be made available for the preparation of such statement, and it asked specifically that PASNY furnish certain data and that Intervenors furnish the prepared testimony which should have been filed on or before January 18, 1972. The Examiner directed that PASNY furnish the requested material as soon as possible and that "the staff will have 45 days from the receipt of that material to file the detailed environmental statement required by the court's mandate."

Intervenors did not appear at the conference. Instead, they expressed their positions in a letter dated January 25, 1972, in which they challenged the Examiner's continuing jurisdiction in the proceeding through the Court of Appeals' statement,

> "We leave to the *Commission* to determine the most efficient procedure for meeting this mandate [Emphasis added]."

They also indicated that the character and scope of their witnesses' testimony would be substantially affected by the Commission staff's environmental impact statement, and

that it would be financially burdensome and wasteful of time to file what they had prepared and submit their witnesses to cross-examination prior to their receipt of such impact statement. Nonetheless, the Examiner ruled that he had continuing jurisdiction and directed "them to file this overdue direct testimony forthwith", granting leave for Intervenors to move that "such witnesses be cross-examined at a time and place convenient".

By letter dated February 4, 1972, Intervenors asked the Examiner to reconsider such rulings and, in any event, to reduce all of his conference rulings to writing and refer them to the Commission pursuant to § 1.28 of the Commission's Rules of Practice and Procedure. As a result, the Examiner issued a Notice dated February 9, 1972, in which he set forth, reconsidered and reaffirmed his conference rulings[2] and certified them to the Commission.

Intervenors state in their request that "we had testimony in a prepared form on January 17, 1972 and obviously it would be a small burden, financially speaking, for us to file this material at this time." They assert, however, that they should not have to file the testimony because to do so would further violate NEPA by continuing the hearing prior to the preparation by the Commission staff of a draft environmental impact statement, and they state that such

> ". . . testimony contains statements of position, recommended compromises and admissions which we may not wish to make after we have had the opportunity to review both the staff impact statement and any comments thereon which are submitted within the 45 day circulation period. We cannot say, due to the changed circumstances, whether any, all or a part of this testimony will be part of our direct case."

Nonetheless, Intervenors offered to make available "all backup material used by our witnesses in preparing the tes-

[2] Although the Notice states that the Examiner denied Intervenors' request for reconsideration, its context indicates that he reconsidered but declined to change his rulings.

timony which was ready on January 17, 1972, the files of the Greene County Planning Board, and the employees of the Planning Board for consultation".

On February 14, 1972, we petitioned the Court of Appeals for a rehearing of its opinion issued January 17, 1972, and, consequently, we do not consider it appropriate to attempt to interpret it at this time. On the other hand, the public interest requires that this proceeding progress rather than remain dormant pending judicial review; and for this reason the Commission staff offered to prepare a draft environmental impact statement and requested that the environmental information accumulated by all participants be made available for such purpose. Accordingly, any environmental information which is in the form of prepared testimony of Intervenors' direct witnesses should be made available to the Commission staff and other participants together with the other environmental material to be furnished by the participants.

The Commission finds:

In the present posture of this proceeding, the best adopted procedure for assuring compliance with the Federal Power Act and the National Environmental Policy Act of 1969 is set forth in principle below, subject to the continuing authority of the Presiding Examiner to issue further rulings to implement this Order.

The Commission orders:

(A) As soon as practicable, all participants to this proceeding shall make available to the Commission staff and other participants all environmental information requested from them during the course of the conference on January 28, 1972, including any environmental information which is in the form of prepared testimony of Intervenors' direct witnesses which was due for filing on January 18, 1972; but "statements of position, recommended compromises and admissions" may be deleted.

(B) The Commission staff shall prepare a draft environmental impact statement, and shall file it and commence circulation within 45 days after receipt by it of the foregoing environmental information. Participants and agencies shall have 45 days from the date of such filing in which to comment on such statement.

(C) The Examiner shall reopen the record to receive, as soon as practicable after the completion of such circulation period, additional direct testimony from PASNY and the Commission staff, and to allow additional cross-examination promptly thereafter; and he shall open the record to receive, as soon as practicable after the completion of such cross-examination, direct testimony from Intervenors, and to allow cross-examination promptly thereafter.

(D) The Examiner's conference rulings set forth in his Notice dated February 9, 1972, are affirmed to the extent that they are consistent with this Order and reversed to the extent that they are inconsistent herewith.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

FPC Order of June 1, 1972

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

POWER AUTHORITY OF THE STATE OF NEW YORK } Project No. 2685

ORDER PARTIALLY RESCINDING ORDER OF MARCH 7, 1972 AND STAYING FURTHER PROCEEDINGS

(Issued June 1, 1972)

On June 6, 1969, the Commission granted a license to the Power Authority of the State of New York (PASNY) to construct and operate the Blenheim-Gilboa Pumped Storage Project No. 2685 including, as part of the project works, three 345 Kv transmission lines (41 FPC 712). The principal project works and two of the lines are currently nearing completion. This proceeding involves PASNY's application to construct the third line, which it proposes to route from the Town of Gilboa, in Schoharie County, New York, to the Leeds substation in the Town of Athens, in Greene County, New York.

On January 17, 1972, the United States Court of Appeals for the Second Circuit issued an opinion holding that the Commission staff is required by the National Environmental Policy Act of 1969 (NEPA) to prepare and circulate a draft environmental statement and should have done so prior to hearing.[1] We filed a petition for rehearing which was denied on March 10, 1972.

On March 7, 1972, prior to the Court of Appeals' denial of rehearing, we issued an order setting forth the procedure to be followed in this proceeding pending judicial review

[1] *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412 (CA 2, 1972).

of the *Greene County* decision. Among other things, we concluded that this proceeding should progress rather than remain dormant pending review, and that Commission staff, in compliance with the mandate of the Second Circuit, should proceed with the preparation of a draft environmental statement to be filed within 45 days following the receipt of certain environmental information from the participants.

Since the issuance of our order of March 7, 1972, and the denial of rehearing by the Court of Appeals, the Solicitor General of the United States has agreed to file, on behalf of the Federal Power Commission, a petition with the United States Supreme Court for a writ of certiorari to review the judgment of the Court of Appeals. In view of this fact, and pursuant to our authority under Section 309 of the Federal Power Act, we have decided to rescind our order of March 7, 1972, to the extent that it: (1) requires the Commission staff to prepare and circulate a draft environmental impact statement, (2) directs the Examiner to reopen the record for the receipt and cross-examination of additional evidence, and (3) affirms certain rulings of the Examiner, as set forth in his notice dated February 9, 1972, which are inconsistent with our action today. Such action, we believe, is required in order to preclude the possibility that the issue for which review is sought might become moot. An early resolution of this issue by the Supreme Court will serve to eliminate uncertainty in this proceeding as well as in many other cases before the Commission in which NEPA issues have been raised.

In order to avoid a conflict with the mandate of the Second Circuit, we deem it appropriate to stay these proceedings pending final review by the United States Supreme Court of the validity of the judgment of the Court of Appeals.

The Commission finds:

The proper disposition of the present proceeding will be best served through the partial rescission, as set forth be-

low, of our order of March 7, 1972, and the cessation by Commission staff of any further action toward the preparation of a draft environmental statement pending further order of this Commission. Moreover, these proceedings should be stayed pending final review by the United States Supreme Court of the validity of the judgment of the Court of Appeals in *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 415 (CA2, 1972).

The Commission orders:

(A) Pursuant to our authority under Section 309 of the Federal Power Act, ordering paragraphs (B), (C), and (D), of our order of March 7, 1972, in this proceeding are rescinded and the Commission staff is directed to take no further action toward the preparation of a draft environmental impact statement, pending further order of this Commission.

(B) The proceedings in this matter are stayed pending final review by the United States Supreme Court of the Court of Appeals decision in *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 415 (CA2, 1972).

(C) The Examiner's conference rulings set forth in his Notice dated February 9, 1972, are affirmed to the extent that they are consistent with this order and reversed to the extent they are inconsistent herewith.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

FPC Order of July 5, 1972

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

POWER AUTHORITY OF THE STATE OF NEW YORK } Project No. 2685

ORDER DENYING MOTION FOR RECONSIDERATION

(Issued July 5, 1972)

On June 6, 1969, the Commission granted a license to the Power Authority of the State of New York (PASNY) to construct and operate the Blenheim-Gilboa Pumped Storage Project No. 2685 including, as part of the project works, three 345 Kv transmission lines (41 FPC 712). The principal project works and two of the lines are currently nearing completion. This proceeding involves PASNY's application to construct the third line, which it proposes to route from the project switchyard in the Town of Gilboa, Schoharie County, New York, to the Leeds substation in the Town of Athens, Greene County, New York.

On January 17, 1972, the United States Court of Appeals for the Second Circuit held in *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412, that the Commission staff is required by the National Environmental Policy Act of 1969 (NEPA) to prepare and circulate a draft environmental impact statement and should have done so prior to the hearing. On February 14, 1972, we petitioned the Court of Appeals for a rehearing.

On March 7, 1972, considering at that time that "the public interest requires that this proceeding progress

rather than remain dormant pending judicial review", we issued an order adopting a procedure for assuring compliance with the Federal Power Act and the National Environmental Policy Act of 1969 pursuant to the Second Circuit's mandate that the "staff should prepare a detailed statement before the Presiding Examiner issues his initial decision." On March 10, 1972, the Second Circuit denied our petition for rehearing, and subsequently the Solicitor General of the United States agreed to file in the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of the Second Circuit. In order to preclude the possibility that the issue for review might become moot, we issued an order on June 1, 1972, partially rescinding our order issued March 7, 1972, and staying further proceedings.

On June 6, 1972, we received from PASNY a telegram, which we are treating as a motion for reconsideration, protesting our Order issued June 1, 1972, and asking that it be rescinded. Asserting that the Gilboa-Leeds line is the most important of the three transmission lines to serve the project and is the key to reliable delivery of power to the New York area, PASNY urged that this proceeding should not be stayed to test a legal issue in the Supreme Court while other licensing proceedings are allowed to continue without the staff having prepared environmental impact statements prior to hearing. PASNY also asserted that the delay is very much against the public interest and that the longer it continues, the greater the transmission line changes, additional costs and environmental problems to be encountered.

Although PASNY also asked that we withdraw our request to the Solicitor General, the petition for a writ of certiorari was filed in the Supreme Court of the United States on June 8, 1972; and, among other matters, it advised the Court of our Orders issued March 7 and June 1,

1972. While we regret the consequences of the delay resulting from our stay, we consider our action to have been necessary and appropriate to carry out the provisions of the Federal Power Act and the policies and goals of the National Environmental Policy Act of 1969.

On June 21, 1972, two days after the last date for filing answers, we received for filing an unsigned original and two copies of the answer and cross-motion of Intervenor Greene County Planning Board, which we are also considering. While the answer generally supports our Order issued June 1, 1972, and questions PASNY's assertions with respect to the importance of the Gilboa-Leeds line, the cross-motion (1) asserts that PASNY's telegram was considered to be a valid filing of a motion although it did not comply with our Rules of Practice and Procedure and (2) requests "that all future filings in this proceeding be deemed proper if an original and two copies are sent to the Commission, and each party of record served with one copy." We believe, however, that in acting upon PASNY's telegram the Secretary of the Commission properly discharged his duties by construing it as a motion for reconsideration, serving it upon the other participants, and thereby affording them an opportunity to respond.

The Commission orders:

PASNY's motion for reconsideration of our Order issued in this proceeding on June 1, 1972, and Greene County's cross-motion for relaxed filing procedures, are denied.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

FPC Order of August 1, 1972

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

POWER AUTHORITY OF THE STATE OF NEW YORK } Project No. 2685

ORDER DENYING APPLICATION

(Issued August 1, 1972)

Power Authority of the State of New York (PASNY) filed a telegram June 6, 1972, which the Commission by letter of June 8, 1972, advised all parties would be treated as a motion for reconsideration of its Order of June 1, 1972, which stayed the proceeding on PASNY's application for authorization to construct a third transmission line for the Blenheim-Gilboa Pumped Storage-Project No. 2685.

In our order of July 5, 1972 we denied the motion for reconsideration after considering PASNY's assertions that staying the proceedings was against the public interest and stated:

> Although PASNY also asked that we withdraw our request to the Solicitor General, the petition for a writ of certiorari was filed in the Supreme Court of the United States on June 8, 1972; and, among other matters, it advised the Court of our Orders issued March 7 and June 1, 1972. While we regret the consequences of the delay resulting from our stay, we consider our action to have been necessary and appropriate to carry out the provisions of the Federal

Power Act and the policies and goals of the National Environmental Policy Act of 1969.

On July 3, 1972, PASNY filed an application pursuant to Section 313 of the Federal Power Act and Section 1.34 of the Commission's Rules of Practice and Procedure for rehearing of the Commission's order of June 1, 1972, by which the proceedings were stayed.

In addition elaborating on its reasons why it believed the stay of proceedings to be against public interest, PASNY also asserted without elaboration that ". . . The June 1 Order, having been issued without notice in violation of relevant statutes and the Commission's own regulations, was void." PASNY does not refer to any particular statutory or regulatory provisions, and we are not aware of any requiring Notice before the Commission could temporarily stay its own proceedings. On the contrary, in view of the breadth of our discretion under Section 309 of the Federal Power Act (16 U.S.C. Section 825(h)), established in *Niagara Mohawk Power Corporation* v. *Federal Power Commission*, 379 F.2d 153 (1967), we are confident as to the validity of our Order issued June 1, 1972.

Inasmuch as the June 1 Order complained of is procedural in nature, the Commission may modify it at any time and continue the proceedings, when to do so will not conflict with the mandate of the Second Circuit in *Green County Planning Board* v. *Federal Power Commission*, 455 F.2d 415 CA2, (1972), and will not render moot a serious legal question now pending for review by the Supreme Court of the United States in this same case.

Since PASNY's application of July 3, 1972, reiterates with elaboration contentions similar to those set forth in the telegram of June 6, 1972, and which were considered in our denial of July 5, 1972, the application should likewise be denied.

The Commission orders:

The Application of the Power Authority of the State of New York filed July 3, 1972 asking for further reconsideration of our order of June 1, 1972 is denied.

By the Commission.

(SEAL)

MARY B. KIDD,
Acting Secretary.

Presiding Examiner's Notice of Certification

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

POWER AUTHORITY OF THE STATE OF NEW YORK (PASNY) } Project No. 2685

PRESIDING EXAMINER'S DENIAL OF REQUEST TO RECONSIDER RULING MADE AT CONFERENCE ON JANUARY 28, 1972 AND NOTICE OF CERTIFICATION

TO THE COMMISSION:

Cross-examination of applicants and staff's direct case was concluded on January 7, 1972, and the hearing was recessed to resume February 15, 1972, for the cross-examination of Intervenors prepared testimony due on or before January 18, 1972. On January 17, 1972, the Court of Appeals issued an opinion in *Greene County Planning Board* v. *Federal Power Commission et al.* Docket Nos. 71-1991, 1996 holding *inter alia* that the Commission failed to comply with the National Environment Policy Act and remanding for further proceedings in accordance with its opinion. Accordingly, a conference was called for Friday, January 28, 1972 at 10 A.M., at the Office of the Commission for the purpose of considering the impact of the Court of Appeal's opinion on the future course of the proceeding and adopting such procedures and schedules as may be required by the courts opinion and remand.

By letter dated January 18, 1972, the Presiding Examiner was advised that Intervenors, in view of "yesterdays opinion of the United States Court of Appeals . . . are not submitting any direct testimony at this time." . . . and "await guidance from the Commission concerning *the* most efficient procedure for meeting the mandate of the Court."

On January 25, 1972, Intervenors wrote advising that they would not be at the conference, that the conference was not properly called, and requesting that the letter be copied into the transcript of the conference as a statement of their position (See TR. 1864-1867).

The conference was held on Friday, January 28, 1972 (See attached transcript Vol. No. 12) at which time the Presiding Examiner considered the position and requests of all the parties, including Intervenors, and made the following rulings:

1. The Presiding Examiner's continuing jurisdiction to proceed with the hearing, and to determine the most efficient procedure for meeting the court's opinion, has not been terminated or revoked by the Commission or by the Courts.

2. The Staff was directed to file a detailed environmental statement within 45 days from the receipt of certain requested data from Applicants, and to serve copies of such statement on all the parties and Agencies to whom the Applicants Environmental Statement was distributed.

3. All parties and agencies will have 45 days thereafter to file their comments along with any answering testimony or requests for a further opportunity to examine PASNY and Staff witnesses in the light of Staff environmental statement.

4. Intervenors were directed to file forthwith their direct testimony, due January 18, 1972, and to make any motions they deemed necessary concerning a convenient time and place for cross-examination of their witnesses.

5. The February 15th hearing date was recessed pending the filing of Intervenors direct testimony. A new hearing date will be fixed when such testimony is filed.

On February 4, 1972, Intervenors wrote requesting, *inter alia*, that I reconsider the above rulings, correct the record, and in any event, refer them to the Commission. (A copy of their letter is attached.)

The Presiding Examiner has carefully reconsidered his rulings in the light of Intervenors letter of February 4, 1972, and sees no good reason for Intervenors continuing default in the filing and cross-examination of its prepared direct testimony concedely available for filing when due on January 18, 1972. The cross-examination of PASNY and Staff's direct case was concluded on January 7, 1972. Progress in completing the direct phase of this proceeding is the most efficient procedure for meeting the Court's mandate pending the filing of the Staff's detailed environmental statement now in preparation. Intervenors will, of course, have full opportunity to respond to such statement, to file answering testimony, and to cross-examine PASNY and Staff witnesses in the light of the statement. Not to proceed with Intervenors prepared direct testimony is conducive to the very delay which Intervenors take such pains to discuss in the Appendix to their letter of February 4, 1972.

Accordingly, their request for reconsideration is denied and the conference rulings reaffirmed. However, in view of the status of this proceeding in the Court of Appeals, the Presiding Examiner's Rulings are certified to the Commission for its consideration, as requested, under § 1.28 of the Commissions Rules of Practice and Procedure.

Respectfully submitted this 9th day of February, 1972.

/s/ William C. Levy
William C. Levy
Presiding Examiner

Attachments

Copy to all Parties

Court of Appeals Order Modifying Opinion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of February, one thousand nine hundred and seventy-two.

GREENE COUNTY PLANNING BOARD,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

TOWN OF DURHAM, NEW YORK and ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, POWER AUTHORITY OF THE STATE OF NEW YORK, THE SIERRA CLUB,

Intervenors.

Upon the motion made herein by intervenor, Power Authority of the State of New York, by notice dated February 14, 1972, to modify and clarify portions of this Court's opinion dated January 17, 1972, it is hereby ordered that the sentence "PASNY has admitted that the Gilboa-Leeds line is part of a plan which may include three massive pumped storage hydroelectric projects, six 345 kilovolt transmission lines and three 765 kilovolt transmission lines", beginning on page 13, line 18 of the opinion, be deleted and the following sentence substituted: "PASNY has indicated that this line is part of a plan which may include an additional massive pumped storage hydroelectric project with attendant transmission lines."

It is further ordered that the date March 21, 1971, on page 5, line 15, of the opinion be deleted and the following date substituted: "March 26, 1971".

It is further ordered that the appearances for the Power Authority of the State of New York be changed to read:

> "Scott B. Lilly, New York, N. Y. (Thomas F. Moore, Jr., New York, N. Y., John R. Davison, New York, N. Y., John C. Mason, Washington, D. C., of counsel), *for Intervenor Power Authority of the State of New York.*"

J. Joseph Smith
Irving R. Kaufman
William H. Mulligan
Circuit Judges

Dated: February 28, 1972

LE COPY

FILED
AUG 9 1972
MICHAEL RODAK, JR., CLERK

No. 71-1597

IN THE

Supreme Court of the United States

October Term, 1971

FEDERAL POWER COMMISSION,

Petitioner,

v.

GREENE COUNTY PLANNING BOARD, ET AL.,

Respondents.

BRIEF OF RESPONDENTS GREENE COUNTY PLANNING BOARD, TOWN OF DURHAM, ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, AND SIERRA CLUB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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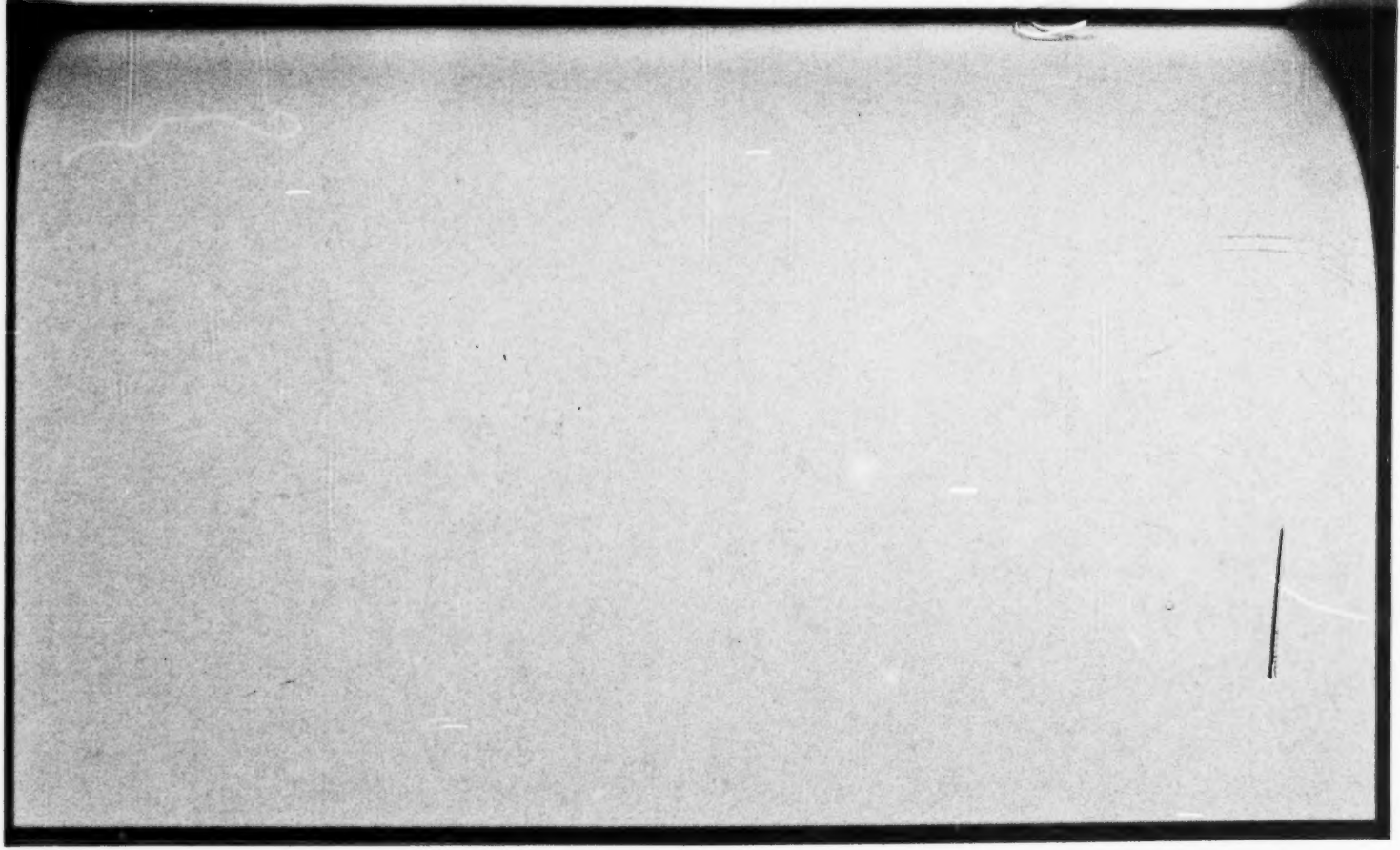

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No. 71-1597

IN THE

Supreme Court of the United States

October Term, 1971

FEDERAL POWER COMMISSION,

Petitioner,

v.

GREENE COUNTY PLANNING BOARD, ET AL.,

Respondents.

BRIEF OF RESPONDENTS GREENE COUNTY PLANNING BOARD, TOWN OF DURHAM, ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, AND SIERRA CLUB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Greene County Planning Board, Town of Durham, Association for the Preservation of Durham Valley, and Sierra Club submit this brief in opposition to the petition for a writ of certiorari.

Question Presented

Whether the Federal Power Commission ("FPC") is exempt from the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* ("NEPA"), which requires all Federal agencies to prepare and publicize detailed environmental impact statements in sufficient time to accompany proposals through the existing agency review processes, and is instead permitted to include such statement in its final decision on the merits of a proposal, merely because its pre-existing review processes include, in some contested proceedings, hearings under the Administrative Procedure

Act, 5 U.S.C. § 551 *et seq.* (1967), at which environmental issues are considered along with engineering, economic and other issues.

Statement

This case arises from the "obstinate refusal" (P. 24a)* of the FPC to comply with the unequivocal requirement of NEPA that "*all* agencies of the Federal Government shall . . . include in *every* . . . major Federal action significantly affecting the quality of the human environment, a detailed [environmental impact] statement by the *responsible official* . . . [to] *accompany the proposal through the existing agency review processes.*" NEPA, § 102(2)(C) (emphasis added).

NEPA had become effective in January 1970. However, it was not until December 1970—almost a year after NEPA's effective date—that the FPC issued its Order No. 415 setting forth procedures which, it thought, were in accord with the Act. The FPC's rules then required the preparation of a detailed statement by its staff *only* in cases of *uncontested* applications; no such statement was or is required to be prepared where applications for licenses are contested.** 18 C.F.R. §§ 2.81(e)-(f) (January 1, 1971). Rather, the Commission utilizes an applicant's draft pending completion of the hearing on the merits. *See* 18 C.F.R. 2.80(b), 2.81(b), 4.41 Ex. W. The Commission does not prepare its own impact statement, as mandated by NEPA, until after it completes its review of all proceedings and decides to grant the application. The effect of these rules was to avoid the affirmative investigatory responsibility placed upon all agencies by NEPA.

---

* "P." refers to the petition for a writ of certiorari. The opinion below is set forth as Appendix A thereto.

** The Commission revised its rules by Order No. 415-B on November 19, 1971. 36 Fed. Reg. 22738 (Nov. 30, 1971). Section 2.81 no longer requires the Commission to prepare its own statement in uncontested proceedings.

This is not a case of a Federal agency making a good-faith effort to comply with NEPA only to be tripped up by some *ex post facto* court-imposed technicality; nor is it a case involving a novel theory or interpretation of a statute. Rather, it is a case of the FPC maintaining, in the face of the clear language of NEPA, an order of the President (Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970)), and the rules of the agency established by NEPA as its watchdog (GUIDELINES OF THE COUNCIL ON ENVIRONMENTAL QUALITY RE: STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT, 36 Fed. Reg. 7724 (1971)),* that it need not issue an environmental impact statement at any time before its decision on the merits of a license application, and that it can discharge its responsibilities in contested cases by relying on the applicant and other litigants—and, in uncontested cases, on the applicant alone—to identify and develop environmental issues and alternatives.

Summary of Reasons Why Writ Should Not Be Granted

The writ of certiorari should be denied because:

1. The proper remedy for petitioner's complaint is to have Congress change NEPA, which Act unequivocally dictated the decision by the Court of Appeals. All of the contentions raised in the petition were carefully reviewed and properly rejected by the Court of Appeals. Since there is no conflict with any decision of this Court or amongst the Circuits, further review by this Court is neither warranted nor necessary.

2. Petitioner substantially overstates the impact of the Court of Appeals' decision on the orderly procedures of the FPC and other Federal agencies and, in any event, mistakenly characterizes congressionally imposed requirements.

---

* Hereinafter referred to as the "CEQ Guidelines."

3. The substantive reasons urged for granting the writ are without merit. The decision of the Court of Appeals is so clearly correct on the merits that the attempt to have this Court hear the case is frivolous.

I

PETITIONER'S REMEDY LIES WITH CONGRESS WHOSE CLEAR LANGUAGE AND INTENT WAS CORRECTLY EFFECTUATED BY THE COURT BELOW

A. In NEPA, Congress imposed a non-delegable responsibility on Federal agencies to identify and publicize environmental impact early in the review process

NEPA sets forth in Section 101 a broad and comprehensive statement of environmental objectives which, in effect, amends the authorizing legislation for all Federal agencies to include these environmental objectives in their legislative mandates. S. REP. No. 296, 91st Cong., 1st Sess. 9 (1969). In addition, NEPA requires all Federal agencies to interpret and administer their policies, regulations and public laws, to the fullest extent possible, in accordance with the environmental objectives of Section 101 of NEPA. NEPA, § 102 (1). The mandatory character of NEPA is made abundantly clear by Section 105, which states that the policies and goals in NEPA are "supplementary to those set forth in existing authorizations of Federal agencies."

Section 102 (2) (C) of NEPA provides that all agencies of the Federal Government shall:

> "Include in every recommendation . . . on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed [environmental impact] statement . . ."

The section further requires that environmental statements be prepared early in an agency's review processes:

> "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, *and shall accompany the proposal through the existing agency review processes*" (emphasis added).

The purpose of Section 102 of NEPA was explained in the Senate Committee Report:

> "The policies and goals set forth in section 101 can be implemented if they are incorporated into the ongoing activities of the Federal Government in carrying out its other responsibilities to the public. In many areas of Federal action there is no body of experience or precedent for substantial and consistent consideration of environmental factors in decisionmaking.
>
> "To remedy present shortcomings in the legislative foundation of existing programs, and to establish *action-forcing procedures* which will help to insure that the policies enunciated in section 101 are implemented, section 102 authorizes and directs that the existing body of Federal law, regulation, and policy be interpreted and administered to the fullest extent possible in accordance with the policies set forth in this act. It further establishes a number of operating procedures to be followed by *all Federal agencies.*"

S. REP. No. 296, 91st Cong., 1st Sess. 19-20 (1969) (emphasis added).

Thus, Congress was not content merely to direct Federal agencies to consider environmental factors. So high was congressional concern, and so distrustful was Congress of agency procedures, that NEPA forced upon Federal agencies an affirmative burden to be borne in a specified manner: through the preparation, by the *agency*, of a detailed written analysis of environmental factors at an early stage in the *existing* agency review processes *prior* to decision.

The clear mandate of NEPA was apparent to President Nixon and the Council on Environmental Quality. The procedures set forth in Executive Order 11514 and the CEQ Guidelines are intended to ensure that the agencies themselves focus on environmental issues at the seminal stages of agency review, and that they obtain comments of appropriate Federal, state and local instrumentalities at such early time on the agency's own environmental views. These procedures by no means require the agency to take a position on the overall merits of a proposal before the other agency review processes, including hearings, are completed. They serve only to ensure that environmental impact is not treated as the stepsister of all the other issues that were, prior to NEPA, given full agency consideration at all levels of agency review.

In the face of agency assertions that the duties created by NEPA are discretionary, or do not require strict compliance, courts of appeals across the nation have consistently called Federal administrative agencies to account for their failure to meet the "high standard [set] for the agencies." *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 449 F.2d 1109, at 1114 (D.C. Cir. 1971). *See also, inter alia, Ely* v. *Velde*, 451 F.2d 1130 (4th Cir. 1971); *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*,

401 U.S. 910 (1971); *Lathan* v. *Volpe,* 455 F.2d 1111 (9th Cir. 1971); and *National Helium Corp.* v. *Morton,* 455 F.2d 650 (10th Cir. 1971). These decisions and that of the Second Circuit in this case, repeatedly reflect the intent of the legislative draftsmen to make NEPA an action-forcing statute which places the environmental burden on the Federal agency in a very special manner at the earliest time in the agency's review processes. 115 CONG. REC. 17451, 17454 (daily ed. Dec. 20, 1969); H.R. REP. No. 765, 91st Cong., 1st Sess. 8-10 (1969); S. REP. No. 296, *supra,* at 19.

Accordingly, the requirements that there be a detailed environmental statement, that it be prepared by a "responsible official" of the agency in accordance with the non-delegable "action-forcing" intent of NEPA, and that it be prepared in time to "accompany the proposal through the existing agency review processes," come directly from Congress. If those requirements are to be altered, it is Congress alone who must do so.*

B. The court below correctly effectuated the language and intent of Congress

The Court of Appeals held:

1. that the NEPA requirement that the environmental impact statement be prepared by a "responsible official" of the FPC could not be delegated to applicants for licenses and that "The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY for its own" (P. 13a); and

2. that the NEPA requirement that the statement "accompany the proposal through the existing agency review

*Almost a dozen bills have been introduced during the present term of Congress to amend NEPA. An annotated listing of these proposals is provided in Appendix A of this brief in opposition.

processes" was violated by FPC procedures, under which the agency statement was prepared at the end of the existing review processes, after a hearing on the merits, and at the time of a decision on the merits, stating:

> ". . . we conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation by *its staff* of its own impact statement . . ." (P. 17a).

Petitioner now argues that the Court of Appeals erred in requiring the FPC to do its job in advance of hearings on the merits of license applications. However, the Court of Appeals also considered this question carefully, pointing out that such hearings unquestionably "constitute an existing agency review process" (P. 17a); that, being on the merits of the license application, it was improper to treat them as environmental impact hearings (P. 16a, n. 23); and that the CEQ Guidelines called for prehearing impact statements in CEQ's construction of the statutory language that the statement "accompany the proposal through the existing review processes" (P. 15a-16a).

Quoting NEPA § 102(2), the Court of Appeals concluded that both the language and policy of NEPA

> "went far beyond the requirement that the agency merely consider environmental factors and include those factors in the record subject to review by the courts" (P. 17a).

Thus, NEPA, which placed the job of preparing a comprehensive statement directly on the agency, was not properly served in an adversary hearing because

> ". . . testimony cannot replace a single coherent and comprehensive environmental analysis, which is itself subject to scrutiny during the agency review processes" (P. 14a).

The Court of Appeals also referred to agency inertia which was so distressing to the draftsmen of NEPA (*supra*, p. 5), the "*status quo* syndrome" (P. 14a), and "the danger the review process will bog down" (P. 15a) inherent in agency review processes once progress is made down the road to decision.

C. Since petitioner is asking this Court to rewrite NEPA, the petition should be denied

The sum and substance of petitioner's argument is that Congress, in enacting NEPA, did not take into account some unique aspects of the nature of the FPC and its hearing procedures; that if it had, it would have exempted the FPC; and, having failed to do so, this Court should undertake to rewrite NEPA. It is respectfully submitted that it is not the function of the courts of the United States to rewrite legislation. By the plain terms of NEPA "all agencies" of the Federal government are bound to examine the environmental impact of their proposals for legislation and for "other major federal actions" which significantly affect the quality of the human environment, in time for the results of such examination to be used in the existing agency review processes. There are no exceptions stated in the Act and it is presumptive to assume that the courts will supply omissions or create exceptions which Congress did not.

II

THE DECISION BELOW IMPOSES NO BURDEN ON ANY AGENCY BEYOND THAT EXPRESSLY MANDATED BY CONGRESS AND IS SENSITIVE TO AGENCY PROCEDURES

Both the petition (P. 13) and the brief of the *amicus**

*Brief of Independent Natural Gas Association of America (hereinafter referred to as the "*amicus* brief").

(at 3-4) state, on the one hand, that the decision below places an intolerable burden on the FPC and, on the other, that compliance with that decision is unlikely to expand the scope of consideration already given to environmental issues. It is difficult to understand then, what all the fuss is about. If petitioner already does all the substantive work necessary to comply with the decision below, then only a procedural readjustment is required. Just why delay would be caused by FPC preparation of an impact statement before, rather than after, hearings is nowhere explained. Nor is it explained why the FPC does not have sufficient staff or expertise to prepare an impact statement, but is equipped to do a full scale environmental review during hearings and also to expose shortcomings in the applicant's statement.* Even if staff limitations exist, it is up to Congress, and not this Court, to increase agency budgets or to decrease their workloads.

The petition recites over and over the litany that the decision of the Court of Appeals will impair the effective functioning of federal licensing agencies because it requires uniform, inflexible procedures (P. 8, 12, 13). However, an analysis of the work of the FPC and the actual mandate of the Court of Appeals demonstrates how hollow that complaint really is.

A. The numbers game

Petitioner (P. 12) recites the number of applications and requests which came before the FPC in fiscal 1970 in an attempt to show the burden the decision below will place on the agency. Petitioner concedes, however, that not all

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*The *amicus* brief on the one hand (at 6-7) relies on staff cross-examination and analysis to develop environmental issues and point up shortcomings in the applicant's presentation, while, on the other hand (at 4-5, 8), arguing that the staff is (a) too undermanned and inexpert to prepare an environmental impact statement and (b) not to be trusted with the power allegedly inherent in such work. Surely, it cannot be both ways.

of these actions require impact statements. Interestingly, petitioner does not allege that most or even many of these applications and requests involve impact statements. Inexplicably, petitioner does not also advise this Court that, of those applications which do require impact statements, only a fraction involve contested hearings.*

In fact, according to the CEQ, in the entire history of NEPA through April 30, 1972, the FPC had filed only seven agency environmental impact statements and, during the same period, had filed applicant environmental reports in only 41 license proceedings.** These totals reflect both contested and uncontested cases.

The conclusion is plain that petitioner is attempting to lead this Court to the erroneous conclusion that the decision below brings all proceedings before the FPC to a grinding halt pending compliance with the mandate of the court below. The fact is that only a fraction of the FPC's workload is affected by the holding of the Court of Appeals.

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*It is relevant to note that the license for the $250 million pumped storage plant in this case was approved without any hearings or other contested proceeding. (P. 4). This was also true of the license for two huge companion transmission lines in this case, which were approved not only without a hearing, but also without an impact statement (P. 23a). "While recently some cases have received wide attention, the vast majority of power generating facilities still go unopposed." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE ON ELECTRIC POWER AND THE ENVIRONMENT, ELECTRICITY AND THE ENVIRONMENT, V-14 (Aug. 1, 1972) [hereinafter cited as CITY BAR REPORT].

**The CAB has never filed an impact statement of any kind in any case. The ICC has filed one 1½ page staff "draft" statement in one case and applicants in two other ICC cases have filed their own environmental report. The impact of NEPA on the Federal Trade Commission, the Federal Maritime Commission, and the Law Enforcement Assistance Administration has likewise been *de minimus*. As for the Atomic Energy Commission, see note at 12, *infra*.

B. The inflexibility argument

Petitioner incorrectly characterizes the opinion below as a straightjacket for "all federal agencies for complying with NEPA" (P. 12).*

First, as petitioner elsewhere points out (P. 2), the holding below is only concerned with the narrow instance of a Federal licensing agency in a contested case requiring a hearing.

Second, petitioner ignores the fact that it is the Congress, in NEPA, which mandated the only aspect of this proceeding which can be termed inflexible, *i.e.*, the preparation and circulation of an environmental impact statement to "accompany the proposal through the existing agency review processes".

Third, the court below in this particular case did not even specify any set procedure for compliance with NEPA, but said, "We leave to the Commission to determine the most efficient procedure for meeting this mandate" (P. 18a). Presumably, the court wanted the FPC and other licensing agencies "to develop procedures tailored for the orderly discharge of their responsibilities" (P. 9).

Indeed, beyond this case the court suggested at least four alternative methods for compliance in recognition of the flexibility to be accorded administrative agencies in getting the impact statement function accomplished: (1) a two-step hearing (P. 16a n. 23), which hearing is specifically contemplated in § 10(e) of the CEQ Guidelines and Executive Order 11514; (2) a "no position" statement (P. 17a n. 24), see, § 6 of CEQ Guidelines; (3) an entirely

*The interest of the Atomic Energy Commission in this case is inexplicable since the court below held the AEC procedures up as a model for the FPC to follow (P. 18a). These procedures predated *Calvert Cliffs' Coordinating Committee* v. *AEC*, *supra*, which required changes in AEC rules not particularly relevant here.

independent agency statement (P. 14a); and (4) the unique procedures used by the AEC (P. 18a).

Additional flexibility is left to the FPC in deciding to which of its officials the impact statement task is to be assigned. For example, the FPC could have a department of its staff handle all impact statements,* or have the specific staff employees assigned to each case do the environmental work in the same way that it previously did prehearing economic and engineering work, or establish special task forces for environmental work on each case or group of similar cases, etc.

To accuse the court below of imposing "an inappropriate, inflexible procedure on the Commission" (P. 13) is to confuse what the court below ordered with what the Congress mandated. The only straightjacket is the one into which petitioner is trying to stuff the opinion of the court below.

C. Some uniformity is the clear intent of Congress and the President

Lastly, to the extent the decision below does impose any uniformity on Federal agencies, such uniformity is consistent with the intent of Congress, the President, and CEQ. *See Calvert Cliffs', supra,* at 1115. Thus, two recent Congressional "oversight" proceedings have recommended that there be "reasonable uniformity of practice among agencies" under NEPA and that NEPA §102(2)(C) be carried out more "uniformly and sytematically" (H.R. REP. No. 316, 92d Cong. 1st Sess. 5-6, 17 (1971); REPORT OF THE COMPTROLER GENERAL TO THE SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION OF THE HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES, IMPROVEMENTS NEEDED IN FEDERAL EFFORTS TO IMPLEMENT

*It is well settled that lack of staff cannot excuse an administrative agency from complying with statutory requirements. *See* text at 10, *supra; Calvert Cliffs, supra,* at 1115.

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, 1, 13 (May 18, 1972). Similarly, President Nixon, in Executive Order 11514, *supra*, evidenced a concern for uniform and systematic compliance with NEPA. *See especially* §§ 2(b) and (d), 3(f) and (h). To be sure, the whole function of the CEQ Guidelines is to insure such uniformity.

III

THERE ARE NO MERITORIOUS NOVEL ISSUES INVOLVED IN THIS CASE

The FPC has raised a number of baseless issues, which are unusual only because they are so far removed from any authority (including the FPC's own rules, *see e.g.*, 18 C.F.R. § 2.80-2.82) in its attempt to obtain a hearing in this Court. These arise from the following claims:

(A) That, although NEPA requires agencies to designate a "responsible official" to prepare impact statements (which are not decisional documents), the FPC cannot do so from its staff since under its "long-established Commission practice, it is the hearing examiner who is responsible for ruling on the merits of an application in the first instance" (P. 9).

(B) That, prior to the close of an evidentiary hearing on the merits, there are no agency review processes (P. 10), even though the hearing is at the end of extensive agency staff review of the license application, consultation with the applicant, and the formulation of preliminary staff conclusions and recommendations.

(C) That an adversary hearing on the merits of a proposal, leading to a decision on the merits containing an environmental analysis, is an adequate substitute for the NEPA requirement of a detailed impact statement prepared by a "responsible official" early in

the agency review processes (P. 10-11), notwithstanding NEPA's requirement that the impact statement be added to existing agency review processes and although the FPC follows the same NEPA procedure regardless of whether or not an application is contested.

(D) That, although no such distinction is made in the statute, the legislative history, the CEQ Guidelines, or any case ever decided under NEPA, NEPA sets up different requirements for licensing agencies as compared with constructing agencies (P. 12).

A. The NEPA statement is not a decision and the "responsible official" need not be the ultimate decisionmaker

The FPC claims it cannot prepare a prehearing impact statement because it cannot designate any "responsible official" other than the hearing examiner, citing *International Paper Co.* v. *FPC*, 438 F.2d 1349 (2d Cir. 1971), *cert. denied*, 404 U.S. 827 (1971),* and that since the examiner, who is charged with making an initial decision on the merits, cannot make such a decision until a hearing is held, there is no "responsible official" until after the completion of the hearings. This is a striking misconception of the role of a NEPA impact statement, which is neither a decision nor document justifying a decision. It is principally a disclosure instrument, with a purpose of describing to the world and to the agency itself the potential environmental impact of the action proposed and reasonable alternatives to that action. *EDF* v. *Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971). There is no requirement in the language of NEPA, nor in the purposes which it

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*The *International Paper* case simply held that the FPC *need not*, under the Freedom of Information Act, disclose internal staff memoranda of legal positions because they were not germane to "final orders" of the Commission.

serves, that the "responsible official" be the ultimate decisionmaker or that he make any decision.

Indeed, the practice of numerous other Federal agencies, including independent agencies with adjudicatory functions, such as the AEC, demonstrates the delegation of the impact statement procedure to "responsible officials" other than the ultimate decision maker. *See e.g.*, 10 C.F.R. § 50, App. D.; 37 Fed. Reg. 15711 (1972) (FCC).

For these reasons, the FPC's point that the staff cannot make final decisions and therefore cannot be responsible for preparing agency impact statements is irrelevant and without merit.

B. The FPC review processes begin when an application is filed; the hearing is an integral part of these processes

Petitioner's argument that the FPC's review processes do not begin until the hearing is closed is incredible on its face and is not in accord with FPC practice.

For example, under the FPC's NEPA Rules, the FPC at the time of application "make[s] an initial review of the applicant's statement [of environmental factors] and issue[s], if necessary, any deficiency letters as to sufficiency of form" (18 C.F.R. § 2.81(b), P. 44a). In addition, at the same time, the FPC decides whether, "based upon the application and the detailed statement, and a preliminary review thereof by the staff, the proposed action may be a major federal action significantly affecting the quality of the human environment." *Id.* Then during the hearing the FPC is required to "offer evidence for the record in support of [its] environmental position." 18 C.F.R. § 2.81(d).

In the instant case, the detailed and definitive nature of positions taken very early in the review process by the FPC can be seen by a memorandum dated March 13, 1970 after petitions to intervene had been filed and more than a year before the prehearing conference from the FPC's

New York Regional Engineer to the Chief of the FPC Bureau of Power.* Moreover, the record as certified to the Court of Appeals also reveals the extent to which alternatives are narrowed and positions harden long before any hearings. *See e.g.*, R. 153-164.**

NEPA refers to "existing agency review processes". By the use of the plural "process*es*", Congress demonstrated its understanding of the various stages of agency review and its intention that a detailed statement prepared by an agency official be available for consideration at each of those stages.

In the FPC, as we have seen, the existing review processes begin shortly after the application is received.† Detailed consideration is given to the application long before any hearing, and the FPC, through its staff, makes an independent investigation of the circumstances of the application and prepares recommendations. Thus, the hearing, while a crucial part of the proceedings, is far down the road in the review process.†† In fact, after the

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*The entire text of the memorandum was reproduced in an appendix to the Planning Board's reply brief in the Court of Appeals.

**"By the time that a trial-type hearing is held . . . [the applicant and the agency] are not likely to embrace alternatives which would mean substantial revisions of the plans that they have worked so long to perfect." BOYER, A RE-EVALUATION OF ADMINISTRATIVE TRIAL-TYPE HEARINGS FOR RESOLVING COMPLEX SCIENTIFIC & ECONOMIC ISSUES, 27 n.162 (1971) (staff report to the Chairman of the Administrative Conference of the U.S.).

†"While in theory the licensing process consists of an application, hearings, and a decision, in practice, commission-applicant bargaining precedes the hearings and even the filing of an application." CITY BAR REPORT, *supra*, at V-35.

††"Upon the filing of the license application—and in many instances, even before the filing—the FPC staff undertakes its review of the proposed project. This review generally includes meetings with the applicant, where changes may be suggested and other details ironed out." *Id.* at IV-24. Hearings are not held until after "the Staff has completed its review". *Id.* at IV-26.

hearing, there comes the Initial Decision, which under Section 8(a) of the APA, 5 U.S.C. § 557(b), is the final decision of the FPC if there is no appeal. If no agency impact statement is prepared until after the hearings, *i.e.*, until the decision, then there will be no agency detailed statement to accompany the proposal through the review processes.

C. The hearing is no substitute for an impact statement

The petition argues that, in "adversary licensing proceedings", no agency environmental impact statement is required prior to the decision on the merits, because "one of the purposes of the hearings is to obtain evidence on the environmental impact of the proposed project for which the license is sought" (P. 2).

This position ignores (a) the FPC's own rules, which prescribe the identical NEPA procedures both in cases in which a hearing is held and in cases in which no hearing is held (18 C.F.R. § 2.81), and (b) a fundamental purpose of NEPA, which is to require the agency itself to make an independent analysis, available for scrutiny at a hearing on environmental impact, rather than to rely on private parties in an adversary hearing to develop these issues.

If the hearing is a substitute for an FPC environmental impact statement, then one would expect some procedure to be set forth in the FPC's NEPA Rules requiring an agency impact statement in uncontested cases where there is no hearing. However, in uncontested cases the NEPA procedure is exactly the same as in contested cases—the applicant presents an environmental analysis as part of its application, and an environmental analysis is part of the final decision. In each instance, the FPC neglects to have a "responsible official" prepare an environmental impact statement, publicize it, and have it accompany the

proposal through the agency review processes. Thus, the FPC's NEPA Rules themselves belie any contention that the hearing in a contested case is intended as a substitute for the agency's own impact statement.

In addition, nothing is more basic to an understanding of NEPA than that it is intended to contain "action-forcing procedures" to get Federal agencies themselves involved in independent, comprehensive environmental planning early in their review processes. *See* text at 5, *supra*. It is a subversion of that basic principle to leave the development of environmental issues to litigants in an adversary proceeding, even where the agency's staff is a participant. As Circuit Judge Kaufman pointed out:

> "The Commission appears to be content to collate the comments of other federal agencies, its own staff and intervenors and once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions." P. 13a.

and

> "[Staff] testimony cannot replace a single coherent and comprehensive environmental analysis, which is itself subject to scrutiny during the agency review processes." P. 14a.

Finally, the recent Comptroller General's Report, *supra*, noted the importance of prehearing impact statements as crucial to fulfilling that aspect of NEPA which calls for more extensive public participation in Federal decision-making (at 33-36).

To wait until all the evidence is in before commencing agency NEPA procedures surely eviscerates the policy of

the statute, as well as its explicit requirement that the agency's comprehensive statement "accompany the proposal through existing agency review processes."

D. The distinction between a licensing and constructing agency is irrelevant to NEPA

The petition criticizes the Court of Appeals by stating that it "fails to recognize the critical distinction between licensing and constructing agencies" (P. 12). Again, this is a confusion between what the court decided and what Congress mandated. NEPA is a mandate to "*all* agencies of the Federal Government," and makes no distinction between licensing and constructing agencies. Indeed, any such distinction, in the face of such clear statutory language, places an impermissible gloss on the statute.*

Nevertheless, even the factual distinction suggested by the petition is not useful under NEPA. First, the legislative history of NEPA is explicit that one of the purposes of NEPA is to require federal agencies to use procedures which would insure comprehensive environmental planning. S. REP. No. 296, *supra*, at 5. Surely, the first step is for licensing agencies to put their respective houses in order and no longer leave the decision on the course of project development exclusively to license applicants, who historically have controlled this course by the timing and order of their license applications. NEPA commands all agencies forcefully to seize the reins of comprehensive planning and decision-making. Consequently, that licensing agency procedures have in the past been subject to indiscriminate use by private applicants, is an argument

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*The Senate Report clearly faced this issue and treats the "licensing functions of independent agencies" for NEPA purposes as no different than "the ongoing activities of the regular Federal agencies". S. REP. No. 296, *supra*, at 14.

for the application of NEPA to those agencies, and not for any exemption.*

In the *amicus* brief (at 5), reference is made to the great deal of work done in preparation of an applicant's impact statement in one case. Assuming it to be true that "more than two and one-third man years" of time was devoted, this graphcially demonstrates the ability of a licensing agency to utilize the resources of applicants in order to get data for the agency's impact statement.

Thus, not only is there no support in NEPA for a distinction between licensing and constructing agencies, but also the factual distinctions proposed by the petitioner cannot withstand analysis.

CONCLUSION

The decision of the court below was correct. Since no unusual or important issues or conflicts among courts are involved, and since the relief petitioner wants can come only from Congress, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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*Petitioner's observation (P. 12) that a licensing agency "lacks control" of information is fully answered by the court below which specifically upheld the use of the applicant's statement for *information gathering* purposes (P. 17a n.24).

APPENDIX A

Legislation Introduced in Congress Relating to Modifications of Requirements of the National Environmental Policy Act 1970.

H.R. 13752: Amends NEPA by allowing the Atomic Energy Commission to issue "Interim Operating Licenses" for nuclear power plants to operate at 100% of capacity without first filing the required final Environmental Impact Statement. (Passed by the House; now before Senate Interior Committee).

H.R. 14103: Amends NEPA to allow the Environmental Protection Agency to issue water discharge permits under the 1899 Refuse Act without filing environmental impact statements. There are 20,000 permit applications awaiting this amendment. (Before the Merchant Marine and Fisheries Committee).

H.R. 14137: Amends NEPA to allow the President at his discretion to declare an emergency, suspending compliance with the provisions of NEPA for a particular project for the 180 day period. No hearings need be held to examine whether an emergency really exists. A similar bill is being proposed in the Senate.

H.R. 5277: Power Plant Siting Bill: Sets up a procedure for the long range planning and state certification of bulk power generating facilities while specifically eliminating the need to file environmental impact statements as required by NEPA. (Now before House Commerce and Senate Commerce committees).

H.R. 11066: Power Plant Siting Bill: Under "emergency conditions", would allow power plants to be constructed and operated in violation of all local, state, and Federal laws, including NEPA. (Now before House Commerce and Senate Commerce committees).

S. 3381: Would set up regional commissions for administering public works development projects. Authorized projects would not need environmental impact statements as required by NEPA.

Federal-Aid-Highway Act for 1972: Amendments are being drafted to the Highway Transportation Act which would relieve the Department of Transportation of responsibility for filing Environmental Impact Statements for highway projects, as now required by NEPA.

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H.R. 14655, passed by Congress and signed by the President, combined three separate bills as follows:

H.R. 14065: Amends the Atomic Energy Act provisions for interim operating licenses for nuclear plants by altering the traditional hearing process to short cut NEPA.

H.R. 13731: Amends the Atomic Energy Act to provide: early site authorization prior to construction of a nuclear power plant; an optional legislative-type hearing (no discovery or cross-examination by opponents of the plant) for the operating license only after environmental groups first proved that such a hearing was necessary "Interim operating licenses" to be issued without complying with NEPA.

H.R. 13732: Amends the Atomic Energy Act allowing the Atomic Energy Commission to give "Temporary Operating Authorization" for nuclear plants before completion of the Commission's operating license procedure and compliance with the provisions of NEPA. Judicial review is virtually eliminated.